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INTERIM REPORT ON THE ESTATES OF PERSONS INCAPABLE OF MANAGING THEIR PROPERTY

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INTERIM REPORT ON THE
ESTATES OF PERSONS INCAPABLE OF
MANAGING THEIR PROPERTY

KF Ontario. Advisory Committee on the
480 Estates of Incompetent Persons
O561 Interim report on the estates of
1985 persons incapable of managing their
c.2 property

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BACKGROUND OF ATTORNEY GENERAL'S ADVISORY
COMMITTEE ON THE ESTATES OF INCOMPETENT PERSONS

In June 1984, the Attorney General created his Advisory Committee on the Estates of Incompetent Persons.

Public concern has been expressed about the apparent inadequacies in the legislation providing for and governing the management of the property of persons incapable of managing their own property. The Committee was conceived as a means of reviewing and reforming this legislation.

The Advisory Committee was designed to be broadly representative of the community. As the task of the Committee was to recommend revision to complex legislation, it was decided that its members should be lawyers. To accomplish these two objectives, the Attorney General requested and received nominations of lawyers from: the Chief Judge of the District Court of Ontario; the Ministries of Health and Community & Social Services; the Public Trustee; the Canadian Mental Health Association, Ontario Division; the Alzheimers' Society for Metropolitan Toronto; the Ontario Association for the Mentally Retarded; the Advocacy Resource Centre for the Handicapped (ARCH); the Advocacy Centre for the Elderly (ACE); the Civil Liberties Subsection of the Canadian Bar Association (Ontario Branch); the Patient Advocate Program; and the Trust Companies Association of Canada. One independent, private practitioner and the Special Policy Adviser to the Provincial Secretariat of Justice were asked to serve as members. The Chairman and Secretary to the Committee were provided by the Ministry of the Attorney General. In addition, five leading

members of the wills and trusts bar volunteered to serve as consultants to the Committee.

The Attorney General intended that a dialogue exist between the community and the members of the Committee. To this end, he advised members, consultants and staff "to feel free to discuss matters under consideration with the organizations that nominated them and other concerned individuals." His expressed hope was, "that the Committee will achieve a consensus that reflects the community's view on how these serious matters should be resolved." The Committee first met on the evening of September 11, 1984 and weekly thereafter.

LETTER OF TRANSMITTAL OF INTERIM REPORT

July 29, 1985

The Honourable Ian Scott, Q.C.
Attorney General for Ontario
18 King Street East
TORONTO, Ontario
M5C 1C5

Sir:

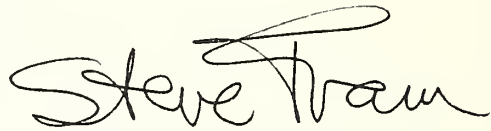
The members of your Advisory Committee were requested by your predecessor in office in August, 1984 to advise the Attorney General on the law related to the management of the property of persons incapable of managing their own property, have the honour to submit an interim report.

The purpose of this Report is two-fold: first, to apprise you and your Cabinet colleagues, the Minister of Health and the Minister of Community & Social Services, of the initial approach that has been taken by the Committee so that you may, if you see fit, redirect the Committee; and second, to have a complete record of the Committee's interim recommendations and the rationale, therefore, arising out of its deliberations related to the property of incapable persons.

It is the Committee's considered view that reform of the law related to the property of incapable persons should proceed together with reform of the law related to personal guardianship. While the existing property provisions related to persons incapable of managing are outdated, existing personal guardianship provisions are so

mute as to provide no guidance to the government, its agencies, or to the community.

We believe that our recommendations in relation to property demonstrate the Advisory Committee's commitment to provide legal remedies of use to the mentally handicapped that, not only protect their civil liberties and personal freedoms, but also, provide protection in the most practical, cost-effective manner. While no price is too high to protect fundamental civil liberties, the Committee is convinced that those rights and freedoms can be protected without a major increase in government spending.

A handwritten signature in cursive script that reads "Steve Fram". The signature is written in dark ink and is positioned above a horizontal line.

Stephen V. Fram
Chair

MEMBER

Joseph Chetner
Kent McClure, Q.C.
Doug Rutherford, Q.C.
A.J. McComiskey, Q.C.
Mary Marshall
Charles E. Onley, Q.C.
Harry Beatty
Gilbert Sharpe
Ross W.S. Flowers
David Baker
Raymond S. Wright
Paul A. Vesa
James K. McDonald
Ellen Liberman
David Solberg
Stephen Fram, Q.C.

NOMINATED BY:

Independent
Provincial Secretariat for
Justice
Ministry of Community &
Social Services
Public Trustee
Canadian Mental Health Assoc.
- Ontario Div.
Alzheimer Society for
Metropolitan Toronto
Ontario Assoc. for Mentally
Retarded
Ministry of Health
Chief Judge of the District
Court of Ontario
A R.C.H. (Advocacy Resource
Centre for the Handicapped)
Trust Companies Association
of Canada
Canadian Bar Assoc. - Ontario
Branch -- (Civil Liberties
Subsection)
A.C.E. (Advocacy Centre for
the Elderly)
Ministry of Health
Psychiatric Patient Advocate
Office
Chair, Ministry of the
Attorney General

CONSULTANTS

Rodney Hull, Q.C.
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David G. Fuller
J.M. Fuke
W.P.G. Allen

I N T R O D U C T I O N

THE NEED FOR CHANGE

Ontario need not feel embarrassed by its record with respect to removing the civil rights of individuals to manage their own property. The number of persons found incompetent or incapable of managing property annually by the courts is small, less than 350. The number annually medically certified, under Part III of the Mental Health Act, is greater, but few, if any, examples can be found of impropriety.

In part, the reason for the positive record lies in the creation by the Legislature of Ontario in 1919 of the office of Public Trustee, a public officer who has exercised an informal supervisory involvement in court appointments of committees or managers of the property of those incapable of managing, and has been the committee or manager of the property of those medically certified as incapable of managing.

One might well ask, "If there is no serious problem of impropriety in finding people incapable of managing, why should this report recommend change?". As the saying goes, "If it ain't broke, don't fix it." The answer is, that the problem is not what is being done but rather what is not being done. The four major problems the community now faces are: first, there are persons who are capable of managing their property, with some help, who are not getting that help; second, there is a strong likelihood that because of the perceived inadequacies of the existing law related to incapacity to manage property, durable powers of attorney are being signed by persons when they do not understand the nature of the document they are

signing; third, there are persons who need a someone to manage their property who do not have one and some family members who are suitable, capable and willing to serve and are now able to serve only by bringing costly court proceedings; and fourth, the organization of the existing law under several Acts, seemingly unrelated to one another, is confusing to non-lawyers and even to lawyers who do not work extensively in this field of law.

These very real problems are certain to grow in severity unless they are addressed. Ontario faces a future with an increasing proportion of its population being elderly. Many elderly residents of the province will be in good health and able to manage their own property. However, advances in health care and medical science will result in greater longevity which means that many more persons will be incapable of managing their property, at least, without help.

It is felt that the term committee is somewhat confusing and does not adequately connote the role which the person is required to assume. Throughout this Report, the Committee has used the term conservator to represent the person who is in a position to manage the property of one who is incapable of doing so. The term conservator is adopted from American usage and appears in both the Uniform Probate Code and the model Guardianship legislation prepared by the American Bar Association. The Committee considered other terms such as trustee, curator and guardian but felt that since each of these terms is currently in use in other legal contexts the possibility of confusion was too great.

Problem 1 - The Need to Assist the Marginally Capable

Legislation providing for substitute decisions in property matters for those who cannot manage should not be perceived as providing a strictly positive value to the community. It is better, if possible to assist a person to make his or her own decisions than to have someone else decide for them.

It is the Committee's view that the first problem facing the community is the need to provide assistance to those who would be incapable of managing their own property without assistance. It is recognized, however, that providing actual assistance will cost money. The Committee appreciates that the needs of government restraint in spending will result in difficult choices regarding the extent of assistance and the scope of the programs.

However, the existing government has acted to establish an excellent model on which future developments can be based. The Ministry of Community and Social Services has established and funded a cost-effective program to provide assistance in financial management, and other vital decisions, to the developmentally handicapped. The program is called the Adult Protective Service Worker Program. It is a practical means of helping adults who have diminished capacity live in the community.

An APSW does not make decisions for an individual. He or she helps the individual living in the community to understand available choices. When a choice is made, for example, to live in an apartment, the APSW helps the individual to find the apartment. The APSW also assists

his or her client in understanding budgeting money, purchasing the right food and other personal life choices.

Part VIII of this Report discusses the program in greater detail, and makes recommendations with respect to its expansion. Currently, it is not available to psychiatric outpatients, or psychiatric ex-patients who may be wandering the streets of the community in desperate need of advice, assistance and advocacy. Neither is it available to victims of head injury nor to the elderly.

The experience with respect to the developmentally handicapped with diminished mental capacity was that once the APSW program was in place, the real needs of many clients could be met by the client making his or her own decisions. In many cases, the need for conservatorship and guardianship of the person is eliminated. It is expected that the experience would be similar for some other groups, if the service was extended to them. There are, however, persons of very limited capacity who could not achieve self-determination.

Problem 2 - The Safeguards for Durable Powers of Attorney

The second major problem perceived by the community is the strong likelihood, that because of perceived inadequacies of the existing law related to incapacity to manage property, durable powers of attorneys are being signed by persons when they do not understand the nature of the document. A related problem is the need to provide guidance to attorneys managing for a person who is incapable and a mechanism for supervising the administration by attorneys acting under durable powers.

This problem paradoxically arises from the attempt by the government to meet the needs of persons incapable of managing their own property.

The increased need to have new legal mechanisms for substitute decision-making with respect to property was first manifest in the public pressure that resulted in changes to the Powers of Attorney Act. Now, a person can create a durable power of attorney that will continue to give authority to a person of his or her choice, the attorney, even after the person is medically certified under the Mental Health Act as incapable of managing. In principle, durable powers of attorney are an extension of self-determination. The next best decision-maker to oneself is a person one has selected.

In practice, two aspects of the existing law are giving rise to community concern. The first, the persons who are signing durable powers of attorney may be doing so when they do not know the nature and consequences of their act. The second is that practical direction and supervision of the attorney does not exist when the donor of the power of attorney has become incapable of managing his or her property. The Committee's recommendations to address these problems are set out in Part II of this Report.

Problem 3 - Further Involvement of Family as Conservators

The third major problem of the existing law is that some persons who need a conservator to manage their property do not have one, and family members who are suitable, capable and willing to serve as conservators can now do so only by bringing a costly court proceeding.

There are a significant number of persons, often residing in nursing homes, who are no longer capable of managing their own property but who do not have a conservator to manage the property for them. Few of these persons are suitable for registration at a mental hospital and, therefore, are not medically certifiable as incapable of managing their property under Part III of the Mental Health Act. The assets of these persons are not sufficient to convince family members to seek court appointment as committee to manage the property under the Mental Incompetency Act. There is family concern about depleting the assets by making such an application. The Committee's recommendation for streamlining court-appointment procedures are set out in Part IV of this Report.

A second aspect of this problem is that family members may be reluctant to assist the person who is incapable of managing to be medically certified under Part III of the Mental Health Act, even when that course of action is appropriate, under existing law, unless a durable power of attorney exists. Where a person is certified under Part III of the Mental Health Act, the Public Trustee becomes committee or manager of the estate. A family member is not permitted to take over management, even when the person is suitable, capable and willing to serve as manager. To assume management, the family member must proceed by court application under the Mental Incompetency Act. The Committee recommendations in Part III of this Report, on the civil effects of medical certification under the Mental Health Act should result in fewer questionable durable powers of attorney and appropriate use of medical certification under the Mental Health Act, enabling family members who meet the criteria of

suitability to act as conservators of the estates of their relatives.

Problem 4 - The Need to Consolidate Relevant Legislation

The fourth problem is that the organization of the existing law under several acts, seemingly unrelated to one another, is confusing to non-lawyers and even to lawyers who do not work extensively in this field of law. Powers of attorney, particularly durable powers; effects of medical certification to manage property; court appointment of a conservator; and the matters related to personal guardianship; are all legal mechanisms for substitute decision-making. Together they provide a range of options. All the provisions that create authority for substitute decision-making give rise to the same public concerns and should be subject to the same or similar supervision and control. The existing separate treatment of these matters, in separate statutes related to substitute decision-making, also obscures the reasons why the state has established procedures to allow removal of an individual's right to manage his or her own property.

Scheme of the Report

The Report is organized into the following Parts:

- Part I -- Substitute Decision-making: When and How
- Part II -- Durable Powers of Attorney
- Part III -- Civil Effects of Medical Certification
 of Incapacity to Manage
- Part IV -- Court Appointment of Conservator

- Part V -- Powers and Authority of Statutory and
 Court-appointed Conservator
- Part VI -- Duties of Conservators and Duties of
 Attorneys under Durable Powers
- Part VII -- Accounting and Compensation for
 Conservators and Paid Attorneys under
 Durable Powers
- Part VIII -- Avoiding Conservatorship: The Community
 Service Worker

Each part begins by setting out some background issues that the Committee believes are in need of attention. There follows a series of recommendations, each of which is fully explained.

SUMMARY OF RECOMMENDATIONS

PART I -- SUBSTITUTE DECISION-MAKING: WHEN AND HOW

RECOMMENDATION: PROTECTING THE RIGHT TO CHOOSE

- 1 (1) THE ONLY VALID REASON FOR THE STATE PERMITTING INTERVENTION TO REMOVE A PERSON'S LEGAL CAPACITY TO DEAL WITH HIS OR HER OWN PROPERTY AND AFFAIRS, AND TO PROVIDE A SUBSTITUTE DECISION-MAKER, IS TO PROTECT THAT PERSON WHEN HE OR SHE IS INCAPABLE OF MAKING THE CHOICES NECESSARY TO MANAGE HIS OR HER OWN PROPERTY.
- 1 (2) INTERVENTION UNDER LEGISLATION DEALING WITH LEGAL INCAPACITY IS NOT JUSTIFIED ONLY FOR THE PROTECTION OF THE PERSON'S DEPENDANTS OR TO MEET SOME OTHER COMMUNITY NEED.
- 1 (3) IT SHOULD BE CLEAR IN THE LEGISLATION THAT THE DEMONSTRATION OF JUDGMENT THAT RESULTS IN FINANCIAL LOSS OR POOR JUDGMENT SHOULD NOT ALONE BE GROUNDS FOR REMOVING THE LEGAL CAPACITY OF A PERSON TO MANAGE HIS OR HER OWN PROPERTY OR AFFAIRS.

RECOMMENDATIONS: TEST OF CAPACITY TO MANAGE PROPERTY

- 2 (1) THE CENTRAL STANDARD THAT SHOULD UNDERLIE ALL LEGISLATIVE TESTS OF CAPACITY TO MANAGE PROPERTY IS WHETHER A PERSON CAN UNDERSTAND THE NATURE OF HIS OR HER ACTION OR REFUSAL TO ACT AND CAN APPRECIATE THE CONSEQUENCES OF SO ACTING OR

REFUSING TO ACT.

- 2 (2) "UNDERSTAND THE NATURE" MEANS ABLE TO RECEIVE AND
EVALUATE SIGNIFICANT INFORMATION RELEVANT TO THE
REQUIRED ACTION OR REFUSAL TO ACT.
- 2 (3) "APPRECIATE THE CONSEQUENCES" MEANS ABLE TO
FORESEE THE RESULTS OF ACTING OR REFUSING TO ACT
THAT ARE REASONABLY FORESEEABLE TO A PERSON OF
ORDINARY UNDERSTANDING.
- 3 (1) A PERSON SHOULD NOT BE FOUND INCAPABLE OF
MANAGING HIS OR HER PROPERTY UNLESS THE PERSON IS:
 - (a) UNABLE TO RECEIVE AND EVALUATE SIGNIFICANT
INFORMATION RELEVANT TO A DECISION TO ACT OR
TO REFUSE TO ACT, WITH RESPECT TO HIS OR HER
PROPERTY, OR
 - (b) UNABLE TO FORESEE THE RESULTS OF ACTING OR
REFUSING TO ACT, WITH RESPECT TO THAT
PROPERTY, WHICH ARE REASONABLY FORESEEABLE
TO A PERSON OF ORDINARY UNDERSTANDING.
- 3 (2) THE SIGNIFICANT INFORMATION THAT A PERSON SHOULD
BE ABLE TO RECEIVE AND EVALUATE IS:
 - (a) THE NATURE AND EXTENT OF HIS OR HER PROPERTY;
 - (b) THE IDENTITY OF THE PERSONS HE OR SHE IS
LEGALLY OBLIGED TO SUPPORT;
 - (c) THE ACTIONS NECESSARY TO MANAGE THE PERSON'S
PROPERTY (INCLUDING BENEFITS AND INCOME) TO
MAINTAIN THE PERSON AND THOSE LEGALLY

DEPENDENT ON HIM OR HER, OR THE ACTIONS
NECESSARY TO HAVE SOMEONE ELSE MANAGE THE
PROPERTY;

3 (3) THE RESULTS THAT ARE FORESEEABLE TO A PERSON OF
ORDINARY UNDERSTANDING ARE:

(a) THAT, IF THE PROPERTY IS NOT MANAGED, THE
PERSON AND HIS OR HER DEPENDANTS MAY NOT BE
ABLE TO MAINTAIN THEMSELVES;

(b) THAT THE PROPERTY MAY NOT BE PRESERVED.

3 (4) THE LAW SHOULD NOT REQUIRE THERE TO BE A
CONSERVATOR OF PROPERTY FOR A PERSON WHO IS
INCAPABLE OF MANAGING BUT HAS NO PROPERTY,
FINANCIAL BENEFITS OR INCOME THAT REQUIRE
MANAGEMENT.

RECOMMENDATION: ONE STATUTE AUTHORIZING SUBSTITUTE
DECISION-MAKING

4 ONE STATUTE SHOULD GOVERN ALL THE LEGAL MECHANISMS FOR
SUBSTITUTE DECISION-MAKING, INCLUDING: POWERS OF
ATTORNEY; THE CIVIL EFFECTS OF MEDICAL CERTIFICATION
OF INCAPACITY TO MANAGE PROPERTY UNDER THE MENTAL
HEALTH ACT, SUCH AS THE POWERS AND DUTIES OF STATUTORY
CONSERVATORS; JUDICIAL DETERMINATION OF INCAPACITY TO
MANAGE PROPERTY AND THE APPOINTMENT OF A CONSERVATOR;
JUDICIAL DETERMINATION OF INCAPACITY TO MEET ESSENTIAL
REQUIREMENTS FOR PHYSICAL HEALTH OR SAFETY AND THE
APPOINTMENT OF GUARDIANS OF THE PERSON. THE STATUTE
SHOULD NOT GOVERN THE ACTUAL MEDICAL CERTIFICATION OF
PERSONS AS INCAPABLE OF MANAGING WHICH SHOULD CONTINUE

TO BE GOVERNED BY PART III OF THE MENTAL HEALTH ACT. THE STATUTE ALSO SHOULD NOT GOVERN CIVIL COMMITMENT OF INDIVIDUALS WHO ARE SUFFERING A DISORDER THAT MAKES THEM DANGEROUS TO THEMSELVES OR OTHERS. CIVIL COMMITMENTS SHOULD ALSO CONTINUE TO BE GOVERNED BY THE MENTAL HEALTH ACT. THE NEW OMNIBUS STATUTE SHOULD BE ENTITLED THE SUBSTITUTE DECISIONS AUTHORITY ACT.

PART II -- DURABLE POWERS OF ATTORNEY

RECOMMENDATION: CAPACITY OF DONOR

- 5 THE LEGISLATION GOVERNING POWERS OF ATTORNEY SHOULD PROVIDE THAT A POWER CAN ONLY BE GIVEN WHEN THE DONOR HAS CAPACITY TO UNDERSTAND THE NATURE OF HIS OR HER ACTION OR REFUSAL TO ACT AND TO APPRECIATE THE CONSEQUENCES OF SO ACTING OR REFUSING TO ACT.

RECOMMENDATION: SAFEGUARD OF CAPACITY -- WITNESSING

- 6 (1) AS A SAFEGUARD WITH RESPECT TO DURABLE POWERS OF ATTORNEY, THAT IS, POWERS OF ATTORNEY THAT WILL CONTINUE AFTER THE LEGAL INCAPACITY OF THE DONOR AND THE MEDICAL CERTIFICATION UNDER THE MENTAL HEALTH ACT OF THE DONOR AS INCAPABLE OF MANAGING HIS OR HER OWN AFFAIRS, THE LIST OF PERSONS PROHIBITED FROM BEING WITNESS TO THE SIGNING OF THE POWER SHOULD BE:
- (a) PERSONS WHO MAY NOT BE INDEPENDENT OF THE ATTORNEY, THAT IS, FAMILY OF THE ATTORNEY WHETHER BY BLOOD, ADOPTION, MARRIAGE AND OTHERS TO WHOM THE ATTORNEY HAS DEMONSTRATED

A SETTLED INTENTION TO TREAT AS HIS OR HER SPOUSE OR CHILD;

(b) PERSONS WHO MAY NOT BE INDEPENDENT OF THE DONOR, THAT IS, FAMILY OF THE DONOR, WHETHER BY BLOOD, ADOPTION, MARRIAGE AND OTHERS TO WHOM THE DONOR HAS DEMONSTRATED A SETTLED INTENTION TO TREAT AS HIS OR HER SPOUSE OR CHILD;

(c) OFFICERS, AGENTS AND EMPLOYEES OF A FACILITY AT WHICH A PERSON RECEIVES BOARD OR OTHER PERSONAL CARE AND IN WHICH THE DONOR RESIDES;

(d) PERSONS INVOLVED IN LITIGATION AGAINST THE DONOR AT THE TIME THE POWER IS SIGNED;

(e) A PERSON WHO HAS A CONSERVATOR OF HIS OR HER PROPERTY.

6 (2) A WITNESS TO A DURABLE POWER OF ATTORNEY SHOULD BE SATISFIED THAT THE DONOR OF THE POWER UNDERSTOOD THE NATURE AND CONSEQUENCES OF THE POWER OF ATTORNEY THAT WAS CREATED. AS PART OF A DURABLE POWER OF ATTORNEY THE WITNESS SHOULD BE REQUIRED TO MAKE A STATUTORY DECLARATION OF HIS OR HER BELIEF IN THE LEGAL CAPACITY OF THE DONOR.

6 (3) TO BE SATISFIED THAT THE DONOR UNDERSTANDS THE NATURE OF A DURABLE POWER OF ATTORNEY, THE WITNESS SHOULD BE SATISFIED THAT THE DONOR IS ABLE TO RECEIVE AND EVALUATE THE RELEVANT SIGNIFICANT INFORMATION, BEING:

(a) THE NATURE AND EXTENT OF THE DONOR'S

PROPERTY;

(b) THAT THE DONOR IS GIVING ANOTHER PERSON, THE ATTORNEY, CONTROL OVER ALL OR PART OF HIS OR HER PROPERTY, SO THAT THE ATTORNEY WILL BE ABLE TO DO ANYTHING WITH THE PROPERTY THAT THE DONOR CAN DO.

6 (4) TO BE SATISFIED THAT THE DONOR UNDERSTANDS THE CONSEQUENCES OF A DURABLE POWER OF ATTORNEY, THE WITNESS SHOULD BE SATISFIED THAT THE DONOR IS ABLE TO FORESEE THE RESULTS OF CREATING A DURABLE POWER THAT ARE FORESEEABLE TO A PERSON OF ORDINARY UNDERSTANDING, BEING:

(a) THAT IF THE DONOR BECOMES INCAPABLE OF MANAGING HIS OR HER PROPERTY, THE ATTORNEY WILL STILL BE ABLE TO MANAGE THE PROPERTY, AND

(b) THAT, IN MANAGING THE PROPERTY, THE ATTORNEY WOULD BE ABLE TO DO THINGS WITH THE PROPERTY THAT THE DONOR MIGHT NOT LIKE.

6 (5) LEGISLATION IMPLEMENTING THESE PROPOSALS MUST HAVE TRANSITIONAL PROVISIONS TO AVOID CREATING PROBLEMS FOR DONORS WHO HAVE CREATED DURABLE POWERS OF ATTORNEY UNDER THE EXISTING LEGISLATION.

RECOMMENDATION: REVOCATION OF POWER OF ATTORNEY

7 (1) AS AT PRESENT A CAPABLE DONOR SHOULD BE ALLOWED TO REVOKE AN ORDINARY POWER OF ATTORNEY.

- 7 (2) A REVOCATION OF A DURABLE POWER OF ATTORNEY SHOULD BE SUBJECT TO THE SAME FORMALITIES AS ITS CREATION.
- 7 (3) A SIMILAR CLASS OF PERSONS SHOULD BE EXCLUDED FROM WITNESSING A REVOCATION OF A DURABLE POWER AS ARE EXCLUDED FROM WITNESSING ITS SIGNING.
- 7 (4) A WITNESS TO THE REVOCATION OF A DURABLE POWER OF ATTORNEY SHOULD BE SATISFIED THAT THE PERSON REVOKING UNDERSTANDS THE NATURE AND CONSEQUENCES OF THE REVOCATION. THE WITNESS SHOULD BE REQUIRED TO MAKE A STATUTORY DECLARATION OF HIS OR HER BELIEF IN THE LEGAL CAPACITY OF THE DONOR THAT WOULD BE PART OF THE REVOCATION.
- 7 (5) TO BE SATISFIED THAT THE PERSON REVOKING THE DURABLE POWER OF ATTORNEY UNDERSTANDS THE NATURE OF THE REVOCATION, THE WITNESS SHOULD BE SATISFIED THAT THE PERSON REVOKING IS ABLE TO RECEIVE AND EVALUATE THE SIGNIFICANT INFORMATION RELEVANT TO THE REVOCATION, BEING THAT THE PERSON REVOKING IS REMOVING ALL AUTHORITY OF THE ATTORNEY TO MANAGE HIS OR HER PROPERTY.
- 7 (6) TO BE SATISFIED THAT THE PERSON REVOKING THE DURABLE POWER OF ATTORNEY UNDERSTANDS THE CONSEQUENCES OF A REVOCATION, THE WITNESS SHOULD BE SATISFIED THAT THE PERSON REVOKING IS ABLE TO FORESEE THE RESULTS OF REVOCATION THAT ARE FORESEEABLE TO A PERSON OF ORDINARY UNDERSTANDING BEING THAT UNLESS THE DONOR IS ABLE TO MANAGE HIS OR HER OWN PROPERTY OR APPOINT SOMEONE ELSE TO MANAGE THE PROPERTY, THE PROPERTY MAY NOT BE PRESERVED.

RECOMMENDATION: PRESUMPTION OF VALIDITY OF POWER
OF ATTORNEY

8 WHERE A DURABLE POWER OF ATTORNEY HAS BEEN SIGNED AND WITNESSED IN THE STATUTORY FORM, THERE SHOULD BE A PRESUMPTION OF ITS VALIDITY AND, THEREFORE, THE LEGAL CAPACITY OF THE DONOR, IN THE ABSENCE OF PROOF TO THE CONTRARY.

RECOMMENDATION: PROTECTING INNOCENT PERSONS WHO RELY
ON POWER

9 THE LEGISLATION GOVERNING DURABLE POWERS OF ATTORNEY SHOULD BE AMENDED TO MAKE IT CLEAR THAT WHEN ANY POWER OF ATTORNEY, INCLUDING A DURABLE POWER OF ATTORNEY, IS TERMINATED, REVOKED, OR BECOMES INVALID BY COURT ORDER, ANY SUBSEQUENT EXERCISE OF THE POWER OF ATTORNEY IS VALID AND BINDING, AS BETWEEN THE DONOR, OR THE ESTATE OF THE DONOR, AND ANY PERSON, INCLUDING THE ATTORNEY, WHO ACTED IN GOOD FAITH AND WITHOUT KNOWLEDGE OF TERMINATION, REVOCATION OR INVALIDITY.

RECOMMENDATIONS: NEW DUTIES OF ATTORNEY UNDER
DURABLE POWERS

10 (1) AN ATTORNEY WHO INTENDS TO CONTINUE TO ACT UNDER A DURABLE POWER OF ATTORNEY AFTER THE DONOR OF THE POWER HAS BEEN MEDICALLY CERTIFIED UNDER THE MENTAL HEALTH ACT AS INCAPABLE OF MANAGING HIS OR HER PROPERTY, SHOULD CONTINUE TO BE REQUIRED TO FILE PROOF OF THE POWER OF ATTORNEY CONTAINING THE RELEVANT CLAUSES AND NOTICE OF HIS OR HER INTENTION TO MANAGE ALL OF THE ESTATE BY MEANS OF

THE POWER OF ATTORNEY.

10 (2) AN ATTORNEY WHO HAS FILED AND GIVEN NOTICE TO THE PUBLIC TRUSTEE OF INTENTION TO MANAGE THE ESTATE, AND ANY OTHER ATTORNEY ACTING UNDER A DURABLE POWER WHO IS UNABLE TO OBTAIN DIRECTIONS FROM THE DONOR REGARDING THE MANAGEMENT OF THE ESTATE, SHOULD BE SUBJECT TO THE FOLLOWING DUTIES WHICH ARE SIMILAR TO THE DUTIES RECOMMENDED FOR STATUTORY AND COURT-APPOINTED CONSERVATORS:

(a) THE STANDARD OF CARE SET OUT IN RECOMMENDATION 34;

(b) THE DUTY TO ACT IN GOOD FAITH AND SOLELY IN THE INTERESTS OF THE PERSON INCAPABLE OF MANAGING, AS SET OUT IN RECOMMENDATION 35;

(c) EXCEPT WHERE THE LIMITATIONS EXPRESSED IN THE POWER OF ATTORNEY ARE IN CONFLICT THEREWITH, THE DISTRIBUTIVE DUTIES SET OUT IN RECOMMENDATION 36.

11 (1) WHERE THE DONOR OF A DURABLE POWER OF ATTORNEY HAS BEEN MEDICALLY CERTIFIED UNDER THE MENTAL HEALTH ACT AS INCAPABLE OF MANAGING HIS OR HER PROPERTY, AND THE ATTORNEY HAS PROVEN THE POWER AND GIVEN NOTICE TO THE PUBLIC TRUSTEE OF HIS OR HER INTENTION TO MANAGE THE ESTATE, THE ATTORNEY, IN ADDITION TO THE OTHER DUTIES, SHOULD HAVE A DUTY TO PROVIDE ANNUAL NOTICE TO THE DONOR, A PERSONAL GUARDIAN OF THE DONOR, IF THERE IS ONE, AND THE PUBLIC TRUSTEE THAT, ON REQUEST, A FINANCIAL STATEMENT REGARDING THE MANAGEMENT OF THE DONOR'S PROPERTY WOULD BE GIVEN TO THEM.

- 11 (2) THE DONOR, A PERSONAL GUARDIAN OF THE DONOR, IF THERE IS ONE, AND THE PUBLIC TRUSTEE WOULD HAVE THE RIGHT TO REQUEST FURTHER PARTICULARS REGARDING THE MANAGEMENT OF THE PROPERTY OF THE DONOR.

RECOMMENDATIONS: PASSING OF ACCOUNTS BY ATTORNEY

- 12 IN ADDITION TO THE DONOR'S RIGHT TO DEMAND THAT AN ATTORNEY ACCOUNT TO HIM OR HER, WHERE THE DONOR HAS BEEN MEDICALLY CERTIFIED UNDER THE MENTAL HEALTH ACT AS INCAPABLE OF MANAGING HIS OR HER OWN PROPERTY, THE DONOR, A PERSONAL GUARDIAN OF THE DONOR, THE PUBLIC TRUSTEE, A PERSON WHO IS A LEGAL DEPENDANT OF THE DONOR, A JUDGMENT CREDITOR AND ANY OTHER PERSON PERMITTED BY THE COURT, SHOULD HAVE THE RIGHT TO APPLY TO THE COURT FOR AN ACCOUNTING.
- 13 (1) THE EXISTING PROVISIONS IN THE POWERS OF ATTORNEY ACT PERMITTING PERSONS OTHER THAN THE DONOR TO APPLY TO THE COURT FOR AN ACCOUNTING WHEN THE DONOR HAS NOT BEEN MEDICALLY CERTIFIED UNDER THE MENTAL HEALTH ACT AS INCAPABLE OF MANAGING HIS OR HER PROPERTY SHOULD NOT BE CONTINUED. INSTEAD, THOSE SEEKING AN ACCOUNTING SHOULD APPLY FOR COURT APPOINTMENT OF A CONSERVATOR AND THE COURT SHOULD HAVE THE POWER SET OUT IN RECOMMENDATION 15.
- 13 (2) THE EXISTING PROVISIONS FOR COURT APPOINTMENT OF A SUBSTITUTE ATTORNEY, NOW CONTAINED IN THE POWERS OF ATTORNEY ACT, SHOULD NOT BE CONTINUED. INSTEAD, THERE SHOULD BE APPLICATION TO THE COURT FOR APPOINTMENT OF A CONSERVATOR IN THESE

CIRCUMSTANCES.

- 14 WHERE THE DONOR HAS BEEN MEDICALLY CERTIFIED UNDER THE MENTAL HEALTH ACT AS INCAPABLE OF MANAGING HIS OR HER PROPERTY AND AN APPLICATION TO THE COURT HAS BEEN MADE FOR AN ACCOUNTING,
- 14 (1) THE COURT, ON MOTION, SHOULD HAVE POWER TO MAKE AN INTERIM ORDER THAT THE DURABLE POWER OF ATTORNEY IS SUSPENDED PENDING THE OUTCOME OF THE APPLICATION, IN WHICH CASE THE PUBLIC TRUSTEE WOULD BECOME INTERIM STATUTORY CONSERVATOR;
- 14 (2) THE COURT SHOULD BE EMPOWERED TO DECLARE THAT THE DURABLE POWER OF ATTORNEY IS TERMINATED, IN WHICH CASE THE PROVISIONS FOR STATUTORY CONSERVATORSHIP WOULD APPLY.
- 15 WHERE THERE IS A DURABLE POWER OF ATTORNEY BUT THE DONOR HAS NOT BEEN MEDICALLY CERTIFIED UNDER THE MENTAL HEALTH ACT TO BE INCAPABLE OF MANAGING, ON APPLICATION FOR COURT APPOINTMENT OF A CONSERVATOR FOR A DONOR ALLEGED TO BE INCAPABLE OF MANAGING HIS OR PROPERTY, THE COURT, ON MOTION, SHOULD HAVE POWER:
- 15 (1) TO MAKE AN INTERIM ORDER THAT THE DURABLE POWER IS SUSPENDED PENDING THE DETERMINATION OF THE APPLICATION;
- 15 (2) TO ORDER THE ATTORNEY TO PASS ACCOUNTS;
- 15 (3) TO APPOINT THE PUBLIC TRUSTEE, OR OTHER PERSON, AS INTERIM CONSERVATOR PENDING THE OUTCOME OF THE APPLICATION;

- 15 (4) TO ORDER THE PERSONS HAVING CUSTODY OF THE ALLEGED INCAPABLE PERSON PERMIT ACCESS TO THE PERSON FOR THE PURPOSE OF ASSESSING THE CAPACITY OF THE PERSON TO MANAGE HIS OR HER PROPERTY;
- 15 (5) TO ORDER THE ALLEGED INCAPABLE PERSON TO SUBMIT TO AN ASSESSMENT TO DETERMINE HIS OR HER CAPACITY TO MANAGE PROPERTY.

PART III - CIVIL EFFECTS OF MEDICAL CERTIFICATION
OF INCAPACITY TO MANAGE PROPERTY

RECOMMENDATION: WHERE STATUTORY PROVISIONS SHOULD BE
SET OUT

- 16 (1) THE PROCEDURE FOR MEDICAL CERTIFICATION AND THE REVIEW OF A MEDICAL CERTIFICATE OF INCAPACITY TO MANAGE PROPERTY SHOULD BE RETAINED IN PART III OF THE MENTAL HEALTH ACT, BUT THE CIVIL EFFECTS OF INCAPACITY TO MANAGE PROPERTY, INCLUDING WHO HAS THE RIGHT TO BE STATUTORY CONSERVATOR AND THE POWERS AND DUTIES OF A STATUTORY CONSERVATOR, SHOULD BE SET OUT IN AN OMNIBUS STATUTE -- THE SUBSTITUTE DECISIONS AUTHORITY ACT.
- 16 (2) THE PROVISIONS FOR MEDICAL CERTIFICATION UNDER THE DEVELOPMENTAL SERVICES ACT SHOULD BE REPEALED AND REPLACED WITH AN ADMINISTRATIVE SCHEME TO EFFECT THE NECESSARY TRANSFER OF FUNDS FROM GOVERNMENT AGENCIES TO FACILITIES FOR THE DEVELOPMENTALLY HANDICAPPED WITHOUT THE RESULT OF REMOVING THE CIVIL RIGHTS OF THE INDIVIDUAL IN QUESTION.

RECOMMENDATION: STANDARDIZATION OF TERMINOLOGY

- 17 THE TERM "INCOMPETENT TO MANAGE HIS ESTATE" IN PART III OF THE MENTAL HEALTH ACT SHOULD BE REPLACED WITH THE TERM "INCAPABLE OF MANAGING HIS OR HER PROPERTY".

RECOMMENDATION: PUBLIC TRUSTEE TO MANAGE INITIALLY

- 18 WHERE THERE IS CERTIFICATION UNDER THE MENTAL HEALTH ACT OF INCAPACITY TO MANAGE PROPERTY, THE PUBLIC TRUSTEE, AS AT PRESENT, SHOULD IMMEDIATELY BECOME STATUTORY COMMITTEE.

RECOMMENDATION: DESIGNATED STATUTORY CONSERVATOR

- 19 (1) A PERSON WHO HAS CAPACITY TO DO SO, SHOULD HAVE THE RIGHT TO DESIGNATE, IN WRITING, THE PERSON, INCLUDING A TRUST COMPANY, OR THE PUBLIC TRUSTEE THAT THEY WANT TO BE THEIR STATUTORY CONSERVATOR (OR WOULD LIKE TO HAVE THE COURT APPOINT AS A CONSERVATOR) IN THE EVENT THAT THE PERSON BECOMES INCAPABLE OF MANAGING PROPERTY.
- 19 (2) THE DESIGNATED PERSON WOULD HAVE THE HIGHEST PRIORITY OF THOSE WHO MAY REPLACE THE PUBLIC TRUSTEE AS STATUTORY CONSERVATOR.
- 19 (3) TO BE EFFECTIVE, A WRITTEN DESIGNATION WOULD BE REQUIRED TO BE WITNESSED BY A PERSON WHO WOULD MAKE A STATUTORY DECLARATION OF HIS OR HER BELIEF THAT THE PERSON MAKING THE DECLARATION HAD THE CAPACITY TO DESIGNATE. THE FORMALITIES FOR THE DESIGNATION OF A STATUTORY CONSERVATOR SHOULD BE

SIMILAR TO THOSE GOVERNING A DURABLE POWER OF ATTORNEY.

- 19 (4) TO BE EFFECTIVE, REVOCATION OF A DESIGNATION WOULD BE REQUIRED TO BE WITNESSED BY A PERSON WHO WOULD MAKE A STATUTORY DECLARATION OF HIS OR HER BELIEF THAT THE PERSON REVOKING THE DESIGNATION HAD CAPACITY TO DO SO. THE FORMALITIES FOR REVOKING A DESIGNATION SHOULD BE SIMILAR TO THOSE THAT WOULD APPLY TO THE REVOCATION OF A DURABLE POWER OF ATTORNEY.

RECOMMENDATION: FAMILY MEMBER'S RIGHT TO BECOME
STATUTORY CONSERVATOR

- 20 (1) FAMILY MEMBERS, IN ORDER OF SPOUSE, ADULT CHILDREN, PARENT AND SIBLING, SHOULD HAVE PRIORITY NEXT AFTER A PERSON DESIGNATED BY THE PERSON INCAPABLE OF MANAGING, TO REPLACE THE PUBLIC TRUSTEE AS STATUTORY CONSERVATOR, AND FOR CONSIDERATION FOR APPOINTMENT AS CONSERVATOR BY A COURT.
- 20 (2) THE PROCEDURE, WHEREBY A FAMILY MEMBER OF LOWER OR EQUAL PRIORITY TO ANOTHER MAY BECOME STATUTORY CONSERVATOR OR CONSIDERED FOR COURT APPOINTMENT AS CONSERVATOR, SHOULD BE SIMILAR TO THE PRACTICE FOR OBTAINING LETTERS OF ADMINISTRATION UNDER THE SURROGATE COURTS ACT.
- 20 (3) WHERE THE PUBLIC TRUSTEE IS NOT SATISFIED REGARDING THE APPROPRIATENESS AS STATUTORY CONSERVATOR OF A PERSON APPLYING TO ASSUME THAT FUNCTION, THE PUBLIC TRUSTEE SHOULD BE ABLE TO APPLY TO THE COURT TO HAVE THE COURT DETERMINE

THE CONSERVATOR. THE REPLACEMENT OF THE PUBLIC TRUSTEE WOULD NOT TAKE PLACE PENDING THE DETERMINATION BY THE COURT OF THE PROPER CONSERVATOR.

- 20 (4) WHERE A PERSON OTHER THAN THE PUBLIC TRUSTEE IS TO BE STATUTORY CONSERVATOR, THE PROPOSED CONSERVATOR SHOULD BE REQUIRED TO POST A SURETY BOND UNLESS THE COURT ON APPLICATION DIRECTS THAT THERE SHOULD BE NO BOND.
- 20 (5) WHERE A PERSON OTHER THAN THE PUBLIC TRUSTEE IS TO BE STATUTORY CONSERVATOR, A PLAN FOR THE MANAGEMENT OF THE ESTATE SHOULD BE DEVELOPED IN CONJUNCTION WITH THE PUBLIC TRUSTEE AND FILED WITH THE PUBLIC TRUSTEE. THE PLAN OF MANAGEMENT SHOULD NOT LIMIT THE POWER OF THE STATUTORY CONSERVATOR TO DEAL WITH THIRD PARTIES BUT COULD, IF NOT FOLLOWED BY THE CONSERVATOR, RESULT IN A COURT DETERMINING THAT THE CONSERVATOR WAS LIABLE FOR DAMAGES TO THE PERSON INCAPABLE OF MANAGING HIS OR HER OWN PROPERTY. THE PLAN OF MANAGEMENT SHOULD BE CAPABLE OF BEING AMENDED IN CONSULTATION WITH THE PUBLIC TRUSTEE.
- 20 (6) THE STATUTORY CONSERVATOR WOULD BE REQUIRED TO PERFORM THE DUTIES RELATED TO THE APPROPRIATE ADMINISTRATION OF THE ESTATE AND THE DUTIES TO ACCOUNT WHICH ARE DEALT WITH IN PART VI OF THIS REPORT.

PART IV -- COURT APPOINTMENT OF CONSERVATOR

RECOMMENDATION: NO DECLARATION OF INCOMPETENCE

21 THE COURT SHOULD BE AUTHORIZED TO FIND A PERSON INCAPABLE OF MANAGING HIS OR HER PROPERTY AND TO APPOINT A CONSERVATOR. THERE SHOULD BE NO DECLARATION THAT A PERSON IS A MENTALLY INCOMPETENT OR INCAPABLE PERSON.

RECOMMENDATION: PRESUMPTION OF CAPACITY/PROOF OF INCAPACITY

22 (1) THE COMMON LAW PRESUMPTION OF CAPACITY SHOULD BE RETAINED. IN ANY PROCEEDING BEFORE A COURT, THE ONUS OF PROVING INCAPACITY SHOULD BE ON THE PERSON WHO ALLEGES IT.

22 (2) IN COURT PROCEEDINGS, THE STANDARD OF PROOF OF INCAPACITY TO MANAGE PROPERTY SHOULD BE PROOF BEYOND REASONABLE DOUBT.

RECOMMENDATION: SUMMARY UNCONTESTED PROCEDURE

23 THE COURT PROCESS THAT RESULTS IN A DETERMINATION OF INCAPACITY TO MANAGE PROPERTY SHOULD PROVIDE FOR A COURT ORDER ESTABLISHING MENTAL INCAPACITY TO MANAGE PROPERTY AND THE APPOINTMENT OF A CONSERVATOR, WITHOUT THE NECESSITY OF A HEARING, PROVIDED THAT EACH ELEMENT THAT MUST BE ESTABLISHED BEFORE AN ORDER IS ISSUED IS PROVEN BY EVIDENCE, AND NO PERSON HAS EITHER FILED AN OBJECTION OR REQUESTED A HEARING.

RECOMMENDATIONS: ELEMENTS OF SUMMARY JUDICIAL PROCEDURE

- 24 AN ORDER DETERMINING THAT A PERSON IS INCAPABLE OF MANAGING HIS OR HER PROPERTY SHOULD BE ISSUED BY THE COURT, SIGNED BY A JUDGE, WITHOUT HEARING, WHERE THE FOLLOWING EVIDENCE IS FILED WITH THE COURT AND NO OBJECTION OR CONTRARY EVIDENCE IS FILED:
- 24 (1) PROOF THAT NOTICE OF THE COURT PROCESS WAS SERVED ON THE PERSON ALLEGED TO BE INCAPABLE OF MANAGING HIS OR HER PROPERTY, THE PUBLIC TRUSTEE, AND THE TWO FAMILY MEMBERS, OTHER THAN THE APPLICANT, WHO HAVE PRIORITY FOR CONSIDERATION AS CONSERVATOR AND WHO ARE RESIDENT IN ONTARIO;
- 24 (2) THE INCAPACITY TO MANAGE OF THE ALLEGED INCAPABLE PERSON MUST BE ESTABLISHED BY OPINIONS TO THIS EFFECT IN STANDARD FORM DOCUMENTS PROVIDED BY AT LEAST TWO PERSONS WHO KNOW THE ALLEGEDLY INCAPABLE PERSON AND WHO CAN EXPECT NO DIRECT OR INDIRECT PECUNIARY BENEFIT AS A RESULT OF THE APPOINTMENT OF A CONSERVATOR;
- 24 (3) A STANDARD FORM DOCUMENT STATING THAT AN EFFORT WAS MADE TO EXPLAIN THE SIGNIFICANCE OF THE NOTICE OF PROCESS AND THE RIGHT OF THE ALLEGEDLY INCAPABLE PERSON TO OPPOSE THAT PROCESS. THIS DOCUMENT MUST BE SIGNED BY A COMMUNITY WORKER WHO HAS VISITED THE ALLEGEDLY INCAPABLE PERSON;
- 24 (4) WHERE THE PUBLIC TRUSTEE IS TO BE THE CONSERVATOR, THE CONSENT OF THE PUBLIC TRUSTEE;

24 (5) WHERE A PERSON OTHER THAN THE PUBLIC TRUSTEE IS
TO SERVE AS CONSERVATOR, THE PUBLIC TRUSTEE'S
CERTIFICATE THAT:

(a) THE PLAN OF MANAGEMENT OF THE PROPERTY PUT
FORWARD BY THE PROPOSED CONSERVATOR HAS BEEN
EXAMINED BY THE OFFICE AND HAS BEEN FOUND
APPROPRIATE;

(b) THE PROPOSED CONSERVATOR HAS BEEN ASSESSED
BY THE PUBLIC TRUSTEE, INCLUDING WHETHER A
BOND IS AVAILABLE, AND THE PUBLIC TRUSTEE
DOES NOT OBJECT TO THE CONSERVATORSHIP OF
THAT PERSON.

25 (1) THE STANDARD FORM DOCUMENTATION TO BE COMPLETED
ON AN APPLICATION FOR AN ORDER APPOINTING A
CONSERVATOR, THOUGH NOT AN AFFIDAVIT, BE MADE
EVIDENCE TO BE CONSIDERED BY THE COURT AND THE
PERSON SIGNING SHOULD BE SUBJECT TO
CROSS-EXAMINATION ON THE DOCUMENTS AS THOUGH THE
CONTENTS OF THE DOCUMENTS WERE MADE UNDER OATH OR
AFFIRMED. THIS RECOMMENDATION SHOULD BE
ADDRESSED IN THE LEGISLATION.

25 (2) WHERE A JUDGE REVIEWING THE DOCUMENTATION IS NOT
SATISFIED BY THE EVIDENCE, HE OR SHE CAN DIRECT
THAT COUNSEL OR THE PARTIES APPEAR OR THAT ORAL
EVIDENCE BE PRESENTED.

RECOMMENDATION: INTERIM CONSERVATOR IN EMERGENCY

26 (1) THERE SHOULD BE PROVISION FOR AN APPLICATION FOR
INTERIM CONSERVATORSHIP BY THE PUBLIC TRUSTEE

WITH NOTICE ONLY TO THE ALLEGED INCAPABLE PERSON. IN EXTREME EMERGENCIES, THE COURT SHOULD BE PERMITTED TO DISPENSE WITH NOTICE TO THE ALLEGED INCAPABLE PERSON;

26 (2) AN INTERIM CONSERVATOR COULD ONLY BE APPOINTED IN EMERGENCY SITUATIONS, SUCH AS MENTAL INCAPACITY TO MANAGE PROPERTY COMBINED WITH A PROPERTY TRANSACTION THAT REQUIRED IMMEDIATE ATTENTION;

26 (3) THE INTERIM CONSERVATORSHIP WOULD BE NON-RENEWABLE AND LIMITED IN DURATION TO 90 DAYS, UNLESS EARLIER TERMINATED ON A MOTION BY THE PUBLIC TRUSTEE OR THE INCAPABLE PERSON;

26 (4) ON AN INTERIM APPLICATION, THE STANDARD OF PROOF WOULD BE TO SATISFY THE COURT OF THE PERSON'S MENTAL INCAPACITY TO MANAGE AND THE NEED FOR THE ORDER. PROOF BEYOND REASONABLE DOUBT WOULD NOT BE REQUIRED.

RECOMMENDATION: NO PARTIAL INCAPACITY TO MANAGE PROPERTY

27 THE COURT SHOULD NOT BE EMPOWERED TO FIND A PERSON PARTIALLY INCAPABLE OF MANAGING PROPERTY WHICH WOULD RESULT IN THE APPOINTMENT OF A CONSERVATOR.

RECOMMENDATION: TERMINATION OF CONSERVATORSHIP

28 (1) A PROCEDURE SHOULD BE ESTABLISHED WHEREBY A COURT ORDER APPOINTING A CONSERVATOR COULD BE TERMINATED WITHOUT THE REQUIREMENT OF A HEARING BEFORE A JUDGE.

28 (2) THE COURT ORDER SHOULD BE TERMINATED WITHOUT A HEARING WHERE AN APPLICATION TO TERMINATE IS BROUGHT BY THE PERSON HAVING A CONSERVATOR, THE PERSONAL GUARDIAN OF THAT PERSON IF THERE IS ONE, THE CONSERVATOR, OR THE PUBLIC TRUSTEE AND THE FOLLOWING EVIDENCE WAS SUBMITTED WITH NO OBJECTIONS BEING RAISED OR HEARING REQUESTED:

- (a) PROOF THAT NOTICE WAS GIVEN TO THE CONSERVATOR AND TO THE PERSONS WHO WERE ENTITLED TO THE NOTICE OF APPLICATION FOR THE APPOINTMENT OF A CONSERVATOR;
- (b) THE APPLICATION TO TERMINATE WAS SUPPORTED BY THE CERTIFIED OPINION, IN STANDARD FORM DOCUMENTATION, OF TWO PERSONS WHO WERE WELL ACQUAINTED WITH THE PERSON HAVING A CONSERVATOR, AND WHO HAVE NO EXPECTATION THAT THEY WILL RECEIVE A DIRECT OR INDIRECT PECUNIARY BENEFIT IF THE CONSERVATORSHIP IS TERMINATED. THE OPINIONS MUST BE TO THE EFFECT THAT THE PERSON IS NOW CAPABLE OF MANAGING ALL, OR MOST, OF HIS OR HER PROPERTY;
- (c) A STANDARD FORM CERTIFICATE IS FILED AS EVIDENCE THAT A COMMUNITY WORKER WHOSE FUNCTION IS TO ASSIST PERSONS TO COPE IN THE COMMUNITY HAS VISITED THE PERSON AND EXPLAINED THE EFFECTS OF THE TERMINATION OF THE ORDER.

28 (3) WHERE OBJECTIONS TO THE TERMINATION ARE RAISED, THE MATTER WOULD GO TO A HEARING BEFORE A JUDGE. WHERE NO OBJECTIONS ARE RAISED, THE ORDER COULD

BE SIGNED BY A JUDGE. THE JUDGE WOULD HAVE THE RIGHT TO DIRECT THE APPEARANCE OF COUNSEL, THE PARTIES OR THE GIVING OF ORAL TESTIMONY.

- 28 (4) UNLESS THE PERSON WITH A CONSERVATOR IS OBJECTING TO THE TERMINATION OF THE ORDER, THE ONUS OF PROVING INCAPACITY TO MANAGE PROPERTY BEYOND REASONABLE DOUBT WILL FALL ON THE PERSON MAKING THE OBJECTION. WHERE THE PERSON WHO OBJECTED TO THE TERMINATION OF THE CONSERVATORSHIP IS THE PERSON HAVING A CONSERVATOR, THAT PERSON WOULD NEED TO PROVE ONLY THAT THERE WAS STILL A NEED FOR A CONSERVATOR.

RECOMMENDATION: MORE ACTIVE ROLE FOR PUBLIC TRUSTEE

- 29 (1) THE PUBLIC TRUSTEE SHOULD PERFORM A MORE ACTIVE ROLE IN APPLYING TO THE COURT FOR APPOINTMENT OF A CONSERVATOR ON BEHALF OF PERSONS HAVING PROPERTY WHO HAVE BECOME INCAPABLE OF MANAGING IT, WHETHER THOSE PERSONS ARE IN THE COMMUNITY OR ARE IN INSTITUTIONS;
- 29 (2) WHERE A PERSON BELIEVED TO BE INCAPABLE OF MANAGING HIS OR HER OWN PROPERTY IS IN AN INSTITUTION, INVESTIGATION BY THE PUBLIC TRUSTEE SHOULD BE INITIATED BY THE SUPERVISORY STAFF OF THE INSTITUTION OR THE FAMILY.
- 29 (3) WHERE A PERSON IS LIVING IN THE COMMUNITY AND THE PUBLIC TRUSTEE HAS REASONABLE AND PROBABLE GROUNDS TO BELIEVE THAT THE PERSON IS INCAPABLE OF MANAGING HIS OR HER OWN PROPERTY, THE PUBLIC TRUSTEE SHOULD BE EXPRESSLY AUTHORIZED TO

INVESTIGATE AND SEEK OUT AN APPROPRIATE PERSON.
WEHRE THERE IS NO APPROPRIATE PERSON OR THIS
PERSON REFUSES TO ACT, THE PUBLIC TRUSTEE SHOULD
HAVE THE POWER TO APPLY TO THE COURT FOR THE
APPOINTMENT OF A CONSERVATOR.

PART V -- POWERS AND AUTHORITY OF STATUTORY
AND COURT-APPOINTED CONSERVATOR

RECOMMENDATION: POWERS OF CONSERVATOR

- 30 (1) SUBJECT TO THE LIMITATIONS IMPOSED BY A COURT, A
STATUTORY OR COURT-APPOINTED CONSERVATOR SHOULD
HAVE POWERS SIMILAR TO THOSE NOW CONFERRED ON THE
PUBLIC TRUSTEE UNDER PART III OF THE MENTAL
HEALTH ACT, THAT IS, THE CONSERVATOR SHALL HAVE,
AND MAY EXERCISE, ALL THE AUTHORITY AND POWERS
WITH REGARD TO THE ESTATE OF THE PERSON INCAPABLE
OF MANAGING THAT THAT PERSON WOULD HAVE, IF OF
FULL AGE, OF SOUND MIND, AND NOT UNDER A
DISABILITY, EXCEPT THE POWER TO MAKE A WILL.
- 30 (2) A STATUTORY OR COURT-APPOINTED CONSERVATOR SHOULD
NOT BE RESTRICTED TO INVESTMENTS SET OUT IN A
LEGAL LIST, BUT THE STATUTE SHOULD SET OUT
CONSIDERATIONS TO BE KEPT IN MIND BY THE
CONSERVATOR WHEN MAKING INVESTMENTS.
- 30 (3) WHETHER THE CONSERVATOR RECEIVES HIS OR HER POWER
AND AUTHORITY TO ACT FROM THE STATUTE OR IS
APPOINTED CONSERVATOR BY THE COURT, THE COURT
SHOULD BE GIVEN THE POWER TO LIMIT THE POWERS AND
AUTHORITY OF THE CONSERVATOR ON APPLICATION, AT

ANY TIME DURING THE CONSERVATORSHIP, AND ALSO, THE COURT SHOULD BE GIVEN THE POWER TO REMOVE ANY LIMITATION IT HAS IMPOSED.

30 (4) ANY LIMITATION OF THE POWERS AND AUTHORITY OF A CONSERVATOR SHOULD:

(a) BE SET OUT IN A CERTIFICATE ISSUED BY THE PUBLIC TRUSTEE IN THE CASE OF A STATUTORY CONSERVATOR, OR

(b) BE SET OUT IN THE ORDER OF THE COURT IN THE CASE OF A COURT-APPOINTED CONSERVATOR.

THE CERTIFICATE WOULD BE PROOF IN THE ABSENCE OF EVIDENCE TO THE CONTRARY THAT THE PERSON NAMED AS STATUTORY CONSERVATOR HAD ALL RIGHTS AND POWERS, EXCEPT THOSE EXPRESSLY LIMITED IN THE DOCUMENT.

30 (5) THE PLAN OF MANAGEMENT THAT A STATUTORY OR COURT-APPOINTED CONSERVATOR WOULD BE REQUIRED TO PREPARE WOULD ESTABLISH THE APPROACH TO MANAGEMENT OF THE ESTATE THAT WOULD BE TAKEN BY THE CONSERVATOR, BUT IT WOULD NOT LIMIT THE RIGHTS AND POWERS OF THE CONSERVATOR. THIRD PARTIES ACTING IN GOOD FAITH WITHOUT ACTUAL KNOWLEDGE OF THE DETAILS OF THE PLAN OF MANAGEMENT SHOULD BE FULLY PROTECTED FROM ANY WRONGDOING BY THE CONSERVATOR. THE STATUTORY OR COURT-APPOINTED CONSERVATOR COULD BE HELD LIABLE BY A COURT FOR DAMAGES TO THE ESTATE THAT RESULTED FROM A DEPARTURE FROM THE PLAN OF MANAGEMENT.

RECOMMENDATION: EMPLOYMENT OF AGENTS

31 WHERE IT IS REASONABLE AND PRUDENT IN THE CIRCUMSTANCES TO DO SO, CONSERVATORS MAY EMPLOY ONE OR MORE PERSONS AS AGENTS WITHIN OR OUTSIDE ONTARIO TO CARRY OUT ANY ACT REQUIRED TO BE DONE IN THE ADMINISTRATION OF THE ESTATE, INCLUDING THE EXECUTION OF DOCUMENTS, THE PAYMENT, TRANSFER, AND RECEIPT OF MONEY FOR OTHER PROPERTY, AND THE GIVING OF DISCHARGES FOR RECEIPTS, BUT EXCLUDING THE EXERCISE OF THE DISCRETION IN DISTRIBUTION OF THE ESTATE OR INCOME OF THE ESTATE, WHICH IS DISCUSSED IN PART VI OF THIS REPORT.

RECOMMENDATION: INVALIDATING CONTRACTS

32 (1) WHERE A PERSON WHO HAS A CONSERVATOR HAS ENTERED A CONTRACT DURING THE CONSERVATORSHIP OR IN THE SIX MONTHS PRIOR TO THE CONSERVATORSHIP, OR DURING SUCH LONGER PERIOD PRIOR TO THE CONSERVATORSHIP AS A COURT, ON MOTION IN THE ACTION DETERMINES IS FAIR, THE CONSERVATOR SHOULD HAVE A RIGHT OF ACTION AGAINST THE OTHER PARTIES TO THE CONTRACT TO AVOID THE CONTRACT. A CONTRACT SHOULD BE VOIDED BY THE COURT UNLESS THE PARTY DESIRING TO SUSTAIN IT CAN SATISFY THE COURT THAT FULL AND VALUABLE CONSIDERATION WAS ACTUALLY PAID OR SECURED.

32 (2) WHERE A PERSON WHO HAS A CONSERVATOR HAS GIVEN A GIFT OR OTHER BENEFIT TO ANYONE DURING THE CONSERVATORSHIP OR IN THE SIX MONTHS PRIOR TO THE CONSERVATORSHIP, OR DURING SUCH LONGER PERIOD PRIOR TO THE CONSERVATORSHIP AS A COURT, ON

MOTION IN THE ACTION DETERMINES IS FAIR, THE CONSERVATOR SHOULD HAVE A RIGHT OF ACTION AGAINST THE BENEFICIARY OF THE GIFT. THE GIFT SHOULD BE VOIDED BY THE COURT UNLESS THE PERSON DESIRING TO SUSTAIN IT CAN SATISFY THE COURT THAT THE PERSON GIVING THE GIFT WAS CAPABLE OF MANAGING HIS OR HER PROPERTY AT THE TIME OF THE GIFT.

PART VI -- DUTIES OF CONSERVATORS AND
DUTIES OF ATTORNEYS UNDER DURABLE POWERS

RECOMMENDATION: DUTIES AND OBJECTIVES IN STATUTE

33 A COURT-APPOINTED CONSERVATOR AND A STATUTORY CONSERVATOR SHOULD NOT BE A TRUSTEE, WITHIN THE MEANING OF THE TRUSTEE ACT. THE DUTIES OF A CONSERVATOR AND STATUTORY DIRECTION REGARDING THE OBJECTIVES FOR THE EXERCISE OF THE CONSERVATOR'S POWERS SHOULD BE SET OUT IN THE SUBSTITUTE DECISIONS AUTHORITY ACT.

RECOMMENDATION: DUTY AND STANDARD OF CARE

34 (1) A NON-PROFESSIONAL CONSERVATOR OR ATTORNEY UNDER A DURABLE POWER SHOULD BE LIABLE TO THE ESTATE OF THE INCAPABLE PERSON WHERE THE CONSERVATOR OR ATTORNEY FAILS TO EXERCISE THE DEGREE OF CARE, DILIGENCE AND SKILL THAT AN ORDINARY, PRUDENT PERSON IN BUSINESS WOULD EXERCISE IN CONDUCTING THAT BUSINESS.

34 (2) PROFESSIONAL CONSERVATORS AND ATTORNEYS, INCLUDING THE PUBLIC TRUSTEE AND A TRUST COMPANY,

WHO, IN FACT POSSESS, OR WHO BECAUSE OF THEIR PROFESSION, BUSINESS, OR CALLING OUGHT TO POSSESS A PARTICULAR LEVEL OF KNOWLEDGE OR SKILL WHICH IN ALL THE CIRCUMSTANCES IS RELEVANT TO THE ADMINISTRATION OF THE ESTATE, SHOULD BE LIABLE TO THE ESTATE OF THE INCAPABLE PERSON WHERE THEY FAIL TO EMPLOY THAT PARTICULAR LEVEL OF SKILL IN THE ADMINISTRATION OF THE ESTATE.

- 34 (3) THE COURT SHOULD BE AUTHORIZED TO RELIEVE A CONSERVATOR OR ATTORNEY FROM LIABILITY WHERE THE CONSERVATOR MIGHT TECHNICALLY BE LIABLE. WHERE THE CONSERVATOR OR ATTORNEY HAS ACTED HONESTLY, REASONABLY, AND DILIGENTLY THE COURT SHOULD HAVE THE AUTHORITY TO RELIEVE THE CONSERVATOR OR ATTORNEY, EITHER WHOLLY OR PARTLY, FROM PERSONAL LIABILITY.

RECOMMENDATION: DUTY REGARDING CONFLICTS OF INTEREST

- 35 THE LEGISLATION SHOULD PROVIDE THAT CONSERVATORS AND ATTORNEYS UNDER DURABLE POWERS SHALL DISCHARGE THEIR DUTIES AND EXERCISE THEIR POWERS IN GOOD FAITH AND SOLELY IN THE INTERESTS OF THE PERSON INCAPABLE OF MANAGING. WITHOUT LIMITING THE GENERALITY OF THIS DUTY, CONSERVATORS AND ATTORNEYS UNDER DURABLE POWERS SHALL NOT KNOWINGLY PERMIT THEMSELVES TO BE IN A POSITION IN WHICH THEIR INTEREST CONFLICTS IN ANY WAY WITH THE DISCHARGE OF THEIR DUTIES AND THE EXERCISE OF THEIR POWERS. THEY ALSO SHALL NOT KNOWINGLY PERMIT THEMSELVES TO BE IN A POSITION IN WHICH THEY MAY DERIVE ANY BENEFIT FOR THEMSELVES OR FOR ANY OTHER PERSON, EXCEPT INSOFAR AS THE DISTRIBUTIVE DUTIES OF A

CONSERVATOR OR AN ATTORNEY REQUIRE THEM TO
PROVIDE SUPPORT TO THEMSELVES AND TO OTHERS AND
SO FAR AS THE COURT MAY PERMIT ON APPLICATION.

RECOMMENDATION: DUTIES AND DIRECTIONS REGARDING
EXPENDITURES AND DISTRIBUTIONS

36 (1) THE CONSERVATOR OR THE ATTORNEY ACTING UNDER A
DURABLE POWER OF ATTORNEY WHO IS UNABLE TO OBTAIN
DIRECTIONS FROM THE DONOR SHOULD BE UNDER A DUTY
TO EXPEND OR DISTRIBUTE AMOUNTS REASONABLY
NECESSARY FOR THE SUPPORT, EDUCATION, CARE OR
BENEFIT OF:

(a) THE INCAPABLE PERSON, AND

(b) THE LEGAL DEPENDANTS OF THE INCAPABLE PERSON.

36 (2) WHERE THE ESTATE IS AMPLE TO FULFILL, AND
CONTINUE TO FULFILL, THE OBLIGATIONS TO PROVIDE
FOR THE INCAPABLE PERSON AND HIS OR HER LEGAL
DEPENDANTS, AS REQUIRED BY 36(1), THE CONSERVATOR
OR ATTORNEY UNDER A DURABLE POWER HAS DISCRETION
TO EXERCISE THE POWERS:

(a) TO EXPEND OR DISTRIBUTE AMOUNTS, MAKE LOANS
AND OTHERWISE ASSIST MEMBERS OF THE
INCAPABLE PERSON'S FAMILY AND OTHER PERSONS
ABOUT WHOSE WELFARE THE INCAPABLE PERSON HAS
SHOWN CONCERN;

(b) TO MAKE GIFTS TO CHARITY AND OTHER OBJECTS
IN WHICH THE INCAPABLE PERSON HAS SHOWN

INTEREST IN SUPPORTING, IN AMOUNTS THAT DO NOT EXCEED IN TOTAL FOR ANY YEAR, 20% OF THE INCOME OF THE ESTATE.

36 (3) IN DETERMINING THE AMOUNTS OF EXPENDITURES OR DISTRIBUTIONS, CONSIDERATIONS GUIDING THE CONSERVATOR OR ATTORNEY SHOULD BE THE FOLLOWING WHICH ARE SET OUT IN DESCENDING ORDER OF IMPORTANCE:

- (a) THE PROBABLE DURATION OF THE INCAPACITY AND THE LIKELIHOOD THAT THE INCAPABLE PERSON, AT SOME FUTURE TIME, MAY BE CAPABLE OF MANAGING HIS OR HER OWN PROPERTY;
- (b) THE SIZE OF THE ESTATE;
- (c) THE ACCUSTOMED STANDARD OF LIVING OF THE INCAPABLE PERSON AND HIS OR HER LEGAL DEPENDANTS;
- (d) THE INTENTIONS, IF ANY, OF THE INCAPABLE PERSON EXPRESSED BEFORE THE INCAPACITY AROSE;
- (e) THE OPINIONS, IF ANY, EXPRESSED BY THE INCAPABLE PERSON, SO THAT INsofar AS IT IS POSSIBLE TO DO SO, EXPENDITURES AND DISTRIBUTIONS WILL BE MADE AS THE PERSON WOULD HAVE MADE THEM HAD THE INCAPACITY NOT OCCURRED. WHERE IT IS NOT POSSIBLE TO DETERMINE WHAT THE PERSON WOULD HAVE DONE IF HE OR SHE HAD REMAINED CAPABLE, THOSE EXPENDITURES AND DISTRIBUTIONS MAY BE MADE IN THE BEST INTERESTS OF THE INCAPABLE PERSON OR HIS OR HER LEGAL DEPENDANTS;

(f) OTHER FUNDS OR SOURCES USED FOR THE SUPPORT OF THE INCAPABLE PERSON.

(g) IN ADDITION TO THE FOREGOING, IN THE CASE WHERE A DISTRIBUTION, LOAN OR OTHER ASSISTANCE IS TO BE MADE TO A PERSON WHO IS NOT A DEPENDANT, WHETHER A MEMBER OF THE INCAPABLE PERSONS FAMILY OR A PERSON NOT RELATED, THE OPINION OF THE INCAPABLE PERSONS FAMILY.

36 (4) THE DUTIES AND CONSIDERATIONS REGARDING EXPENDITURES AND DISTRIBUTIONS SHOULD BE THE SAME WHETHER THE PUBLIC TRUSTEE, A FAMILY MEMBER OR OTHER PERSON IS CONSERVATOR OR ATTORNEY UNDER A DURABLE POWER.

36 (5) THERE SHOULD BE PROVISION FOR APPLICATION TO THE COURT FOR DIRECTIONS BY A CONSERVATOR, ATTORNEY UNDER A DURABLE POWER AND A LEGAL DEPENDANT OF AN INCAPABLE PERSON. THE COURT SHOULD HAVE THE AUTHORITY TO DIRECT ANY EXPENDITURE OR DISTRIBUTION THAT IT IS SATISFIED IS IN THE BEST INTEREST OF THE INCAPABLE PERSON OR HIS OR HER LEGAL DEPENDANTS.

RECOMMENDATION: DUTY TO PERFORM IN ACCORDANCE WITH PLAN
OF MANAGEMENT

37 THE CONSERVATOR, OTHER THAN THE PUBLIC TRUSTEE, WHETHER COURT APPOINTED OR STATUTORY, SHOULD BE UNDER AN OBLIGATION TO PERFORM HIS OR HER DUTIES IN ACCORDANCE WITH A PLAN OF MANAGEMENT.

RECOMMENDATION: ACCOUNTABILITY OF CONSERVATORS

- 38 (1) A CONSERVATOR SHOULD BE REQUIRED TO PROVIDE ANNUAL NOTICE TO CERTAIN PERSONS THAT, ON REQUEST, A FINANCIAL STATEMENT REGARDING THE MANAGEMENT OF THE PROPERTY WOULD BE GIVEN TO THEM.
- 38 (2) A FINANCIAL STATEMENT PROVIDED ON REQUEST SHOULD BE SENT:
- (a) TO THE INCAPABLE PERSON AND TO THE PERSONAL GUARDIAN, IF THERE IS ONE, OF THE INCAPABLE PERSON;
 - (b) IF THE PUBLIC TRUSTEE IS COURT-APPOINTED CONSERVATOR OR STATUTORY CONSERVATOR, THE PERSON RESIDENT IN ONTARIO WITH HIGHEST PRIORITY ENTITLED TO BECOME COURT-APPOINTED CONSERVATOR OR STATUTORY CONSERVATOR;
 - (c) IF A PERSON OTHER THAN THE PUBLIC TRUSTEE IS COURT-APPOINTED OR STATUTORY CONSERVATOR, TO THE PUBLIC TRUSTEE.
- 38 (3) PERSONS WHO HAVE REQUESTED A FINANCIAL STATEMENT SHOULD HAVE THE RIGHT TO REQUEST FURTHER PARTICULARS.
- 38 (4) THE PERSONS ENTITLED TO RECEIVE THE NOTICE OF AVAILABILITY OF A FINANCIAL STATEMENT SHOULD BE ENTITLED TO APPLY TO THE COURT TO CAUSE A PASSING OF ACCOUNTS BY THE CONSERVATOR.
- 38 (5) ON THE WINDING UP OF A CONSERVATORSHIP, THERE SHOULD BE A DUTY ON THE CONSERVATOR TO PASS

ACCOUNTS BEFORE THE COURT (SEE RECOMMENDATION 41).

RECOMMENDATION: DUTY TO WORK TOWARDS SELF-MANAGEMENT

39 THE CONSERVATOR SHOULD HAVE A DUTY TO ASSIST THE INCAPABLE PERSON TOWARDS SELF-MANAGEMENT OF HIS OR HER ESTATE.

RECOMMENDATION: RELATIONSHIP WITH PERSONAL GUARDIAN

40 (1) THE LEGISLATION SHOULD PROVIDE FOR THE RELATIONSHIP BETWEEN THE CONSERVATOR OF THE ESTATE AND THE PERSONAL GUARDIAN, IF THERE IS ONE, AND REQUIRE THE PAYMENT FROM THE ESTATE OF APPROPRIATE AMOUNTS FOR THE INCAPABLE PERSON BY HIS OR HER PERSONAL GUARDIAN.

40 (2) WHERE A PERSON HAS A PERSONAL GUARDIAN AND THERE IS NOT MORE MONEY THAN IS NECESSARY TO PROVIDE FOR THE SUPPORT OF THE INCAPABLE PERSON, THE LEGISLATION SHOULD AUTHORIZE SPENDING BY THE PERSONAL GUARDIAN FOR THE BENEFIT OF THE INCAPABLE PERSON.

PART VII -- ACCOUNTING AND COMPENSATION FOR CONSERVATORS
AND PAID ATTORNEYS UNDER DURABLE POWERS

RECOMMENDATION: FORM OF ACCOUNTS

41 (1) THE ESSENTIALS OF A CONSERVATOR'S OR AN ATTORNEY'S ACCOUNTS SHOULD BE AS FOLLOWS:

- (a) STATEMENT OF ASSETS AT BEGINNING OF PERIOD
- (b) STATEMENT OF ASSETS AT END OF PERIOD
- (c) STATEMENT OF CAPITAL TRANSACTIONS
- (d) STATEMENT OF REVENUE TRANSACTIONS
- (e) STATEMENT OF COMPENSATION CLAIMED

41 (2) THE ESSENTIAL ELEMENTS SHOULD BE THE SAME WHETHER THEY ARE SUBMITTED TO THE PUBLIC TRUSTEE OR TO THE DISTRICT COURT OF ONTARIO.

41 (3) THE LEGISLATION SHOULD PROVIDE FOR A SUGGESTED FORM OF ACCOUNTS IN A SCHEDULE OR IN REGULATIONS, BUT THE USE OF THIS FORM SHOULD NOT BE MADE MANDATORY, SO THAT STATEMENTS WHICH CONFORM TO THE ESSENTIALS REQUIRED ARE ACCEPTABLE.

RECOMMENDATION: ENTITLEMENT TO COMPENSATION

42 THERE SHOULD BE A STATUTORY ENTITLEMENT TO COMPENSATION IN FAVOR OF THE CONSERVATOR.

RECOMMENDATION: FORMAT OF FEE SCALE

43 A SIMPLIFIED FEE SCALE SHOULD BE ESTABLISHED BY REGULATION SETTING OUT AS A NORMAL FEE A PERCENTAGE CHARGE ON REVENUE AND A PERCENTAGE CHARGE ON CAPITAL VALUE.

RECOMMENDATION: ADJUSTING FEES

44 DISCRETION SHOULD BE GIVEN TO THE COURT TO ADJUST THE COMPENSATION CLAIMED BY BOTH THE PUBLIC TRUSTEE AND

PRIVATE SECTOR CONSERVATORS ON THE BASIS OF QUANTUM MERUIT.

RECOMMENDATION: TIMING OF COMPENSATION

45 THE CONSERVATOR SHOULD BE ABLE TO TAKE HIS NORMAL FEES IN MONTHLY INSTALMENTS OR QUARTERLY INSTALMENTS.

RECOMMENDATION: APPROVAL AND SETTLING OF COMPENSATION

46 (1) THE PUBLIC TRUSTEE AND PRIVATE CONSERVATOR SHOULD BE OBLIGED TO GIVE NOTICE ANNUALLY OF THE SUM TAKEN AS COMPENSATION AND AN ACCOUNT OF SERVICES RENDERED TO THOSE PERSONS WHO WE HAVE IDENTIFIED SHOULD RECEIVE NOTICE OF THE AVAILABILITY OF A FINANCIAL STATEMENT. (See Recommendation 38)

46 (2) SUCH PERSONS SHOULD BE ABLE TO CHALLENGE THE AMOUNT OF COMPENSATION OR THE FACT THAT IT IS BEING TAKEN ON AN INTERIM BASIS AND SHOULD BE ABLE TO REQUIRE THAT ACCOUNTS BE PASSED AND THAT COMPENSATION BE REVIEWED BY THE COURT.

46 (3) IF THE PUBLIC TRUSTEE OR PRIVATE CONSERVATOR FEELS THAT THE NORMAL FEES ARE NOT ADEQUATE COMPENSATION FOR THE WORK DONE, THEY MUST OBTAIN THE CONSENT OF PERSONS WHO THEY ARE UNDER A DUTY TO PROVIDE NOTICE TO REGARDING THE AVAILABILITY OF A FINANCIAL STATEMENT WITH THE EXCEPTION OF THE INCAPABLE PERSON.

RECOMMENDATION: COSTS OF ACCOUNTING

- 47 THE COSTS OF PRODUCING ACCOUNTS AND STATEMENT OF COMPENSATION CLAIMED AND SUBMITTING SAME TO THE PUBLIC TRUSTEE SHOULD BE INCLUDED AS PART OF THE COMPENSATION CLAIMED.

RECOMMENDATION: LEGAL FEES RE ACCOUNTING

- 48 WHERE THE ACCOUNTS AND COMPENSATION CLAIM ARE SUBMITTED TO THE COURT, THE LEGAL FEES OF THE SOLICITOR RETAINED TO PRESENT THE ACCOUNTS AND COMPENSATION CLAIM SHOULD BE IN THE DISCRETION OF THE JUDGE. IN ADDITION, JUDICIAL DISCRETION SHOULD EXTEND TO QUANTUM OF LEGAL COSTS INCURRED IN JUSTIFYING THE ACCOUNTS AND COMPENSATION CLAIM IF THE PUBLIC TRUSTEE INITIALLY REJECTS THE ACCOUNTS OR THE COMPENSATION CLAIM AND THE CONSERVATOR MAKES FURTHER SUBMISSIONS TO THE PUBLIC TRUSTEE.

RECOMMENDATION: LEGAL COUNSEL AND FEES

- 49 (1) IN A PROCEEDING OF A COURT OR TRIBUNAL TO DETERMINE THE CAPACITY OF AN INDIVIDUAL TO MANAGE PROPERTY, THERE SHOULD BE AN IRREBUTTABLE PRESUMPTION THAT THE ALLEGEDLY INCAPABLE PERSON HAS CAPACITY TO INSTRUCT COUNSEL.
- 49 (2) WHETHER OR NOT THE PERSON WHO IS THE SUBJECT OF THE PROCEEDINGS TO DETERMINE CAPACITY TO MANAGE PROPERTY IS FOUND CAPABLE OR INCAPABLE OF MANAGING HIS OR HER PROPERTY, THE ESTATE OF THE

PERSON SHOULD BE LIABLE FOR HIS OR HER LEGAL FEES
RELATED TO THE PROCEEDINGS.

PART VIII -- AVOIDING CONSERVATORSHIP: THE
COMMUNITY SERVICE WORKER

RECOMMENDATION: AVOIDING CONSERVATORSHIP AND PERSONAL
GUARDIANSHIP

- 50 (1) IT SHOULD BE A GOVERNMENT OBJECTIVE TO ENABLE
MENTALLY DISADVANTAGED ADULTS TO LEAD LIVES AS
INDEPENDENTLY AND NORMALLY AS POSSIBLE,
CONSISTENT WITH THEIR RIGHTS AND WISHES.
- 50 (2) TO REACH THIS OBJECTIVE, A SYSTEM SHOULD BE
ESTABLISHED WHEREBY COMMUNITY WORKERS CAN BE MADE
AVAILABLE TO HELP MENTALLY DISADVANTAGED ADULTS
WHO NEED AND WANT ASSISTANCE IN MAKING THEIR OWN
PROPERTY AND LIFE CHOICES.
- 50 (3) TO ENSURE THAT SERVICES PROVIDED BY COMMUNITY
WORKERS ARE ONLY SUPPORTIVE OF DECISION-MAKING BY
MENTALLY DISADVANTAGED ADULTS, AND ARE ONLY
PROVIDED WITH THE CONSENT OF THOSE ADULTS, CORE
FUNCTIONS AND STANDARDS SHOULD BE IDENTIFIED AND
ESTABLISHED AS CONDITIONS TO TO ANY PARTICIPATION
IN THE SYSTEM.
- 50 (4) TO ADMINISTER THE SYSTEM, ENSURE THAT THE CORE
FUNCTIONS AND STANDARDS ARE MET, AND TO ALLOCATE
AVAILABLE FUNDING IN ACCORDANCE WITH THE MOST
URGENT NEEDS OF DISADVANTAGED ADULTS, A BOARD
SHOULD BE ESTABLISHED CONTROLLED BY DIRECTORS WHO

ARE PREDOMINATELY REPRESENTATIVE OF ORGANIZATIONS
FOR THE MENTALLY DISADVANTAGED AND THE GOVERNMENT.

- 50 (5) THE ADMINISTRATIVE STRUCTURE -- THE BOARD, AND
THE CORE FUNCTIONS AND STANDARDS -- SHOULD BE
ESTABLISHED FIRST. THEN, AS FUNDS ARE MADE
AVAILABLE, VARIOUS MODELS FOR THE ALLOCATION TO
LOCAL COMMUNITY AGENCIES CAN BE CONSIDERED AND
APPROVED.
- 50 (6) COMMUNITY WORKERS SHOULD BE AVAILABLE TO PERFORM
THE SERVICES RECOMMENDED IN REGARD TO THE SUMMARY
PROCEDURE FOR COURT APPOINTMENT OF CONSERVATORS
AND THE PROCEDURE FOR COURT TERMINATION OF
CONSERVATORSHIP.

PART I -- SUBSTITUTE DECISION-MAKING: WHEN AND HOW

Some Background

Several statutes now provide for substitute decision-making for persons incapable of managing their own property. The Powers of Attorney Act enables a person to create a durable power of attorney that will survive his or her mental incapacity. Part III of the Mental Health Act establishes a procedure whereby a doctor can certify a person as incapable of managing their property. There are two different procedures in the Mental Incompetency Act.

These statutes were enacted and have been amended at various times over the course of more than a century. While these laws do not technically conflict with one another, no attempt has been made in Ontario to develop a consistent approach to substitute decision-making based on central principles. Instead, each statute was enacted and amended to meet particular concerns that have arisen from time to time. The result lacks coherence with respect to the rules governing when and how a person may have his or her rights to control their property removed as well as lacking coherence with respect to the powers and duties of those who act as substitute decision makers.

Under common or customary law, a person who is mentally capable may appoint another to act as his agent or attorney in any or all property transactions. Powers of attorney legislation, until its revision in 1979, was essentially enacted to clarify that attorneys and third parties acting in good faith were afforded protection when they acted without knowledge of the revocation of the authority. The ability to create agents and attorneys and to authorize them to perform functions is a form of

substitute decision-making vital to many forms of transactions. Common law or customary law also provided that the authority of the agent or attorney ended with the incapacity of the principal, donor or giver of the power.

The legislation of 1979 and 1983 established a new type of power of attorney -- one that could continue to exist and be acted upon after the donor or giver of the power became incapable of acting -- provided that the power of attorney contained the requisite clauses. The new kind of power of attorney may be called a durable power of attorney.

Durable powers are a mechanism for substitute decision-making that can permit the attorney to act when the donor is mentally incapable of acting. However, "mentally incapable of managing property" is not defined in the Powers of Attorney Act.

Part III of the Mental Health Act permits a doctor to certify that a person who is registered as a patient or outpatient of the psychiatric facility is "incompetent to manage his property". These words are not defined in the Act.

Section 7 of the Mental Incompetency Act allows the judge to declare a person a "mentally incompetent person". Under clause 1(e) of that Act, "mentally incompetent person" means a person:

- (i) in whom there is such a condition of arrested or incomplete development of mind, whether arising from inherent causes or induced by disease or injury, or
- (ii) who is suffering from such a disorder of the mind,

that he requires care, supervision and control for his

protection and the protection of his property.

Where a person has not been found to be a mentally incompetent person, section 39 of the same Act authorizes a judge to appoint a committee to manage the estate of the person. In this case the judge must be satisfied that the person is incapable of managing his property through mental infirmity arising from disease, age or other cause, or by reason of habitual drunkenness or the use of drugs.

It is confusing to those who are called upon to decide about the fundamental rights of individuals and it is also confusing to the public that no coherent standard exists for deciding when a substitute decision-maker can be authorized to act.

The number of different statutes that may apply to incapacity to manage property also makes it difficult for members of the public to know how best to provide for their own potential loss of capacity and how to appropriately handle the loss of capacity by those who are close to them.

The Committee is of the opinion that the time has come to develop a coherent, cohesive approach to substitute decision-making with respect to property. This approach should be based on fundamental principles that identify when the state is justified in permitting or authorizing others to assume control of the property of an individual. Those principles should be consistently applied to the specific provisions governing substitute decision-making.

RECOMMENDATION: PROTECTING THE RIGHT TO CHOOSE

- 1 (1) THE ONLY VALID REASON FOR THE STATE PERMITTING INTERVENTION TO REMOVE A PERSON'S LEGAL CAPACITY TO DEAL WITH HIS OR HER OWN PROPERTY AND AFFAIRS, AND TO PROVIDE A SUBSTITUTE DECISION-MAKER, IS TO PROTECT THAT PERSON WHEN HE OR SHE IS INCAPABLE OF MAKING THE CHOICES NECESSARY TO MANAGE HIS OR HER OWN PROPERTY.
- 1 (2) INTERVENTION UNDER LEGISLATION DEALING WITH LEGAL INCAPACITY IS NOT JUSTIFIED ONLY FOR THE PROTECTION OF THE PERSON'S DEPENDANTS OR TO MEET SOME OTHER COMMUNITY NEED.
- 1 (3) IT SHOULD BE CLEAR IN THE LEGISLATION THAT THE DEMONSTRATION OF JUDGMENT THAT RESULTS IN FINANCIAL LOSS OR POOR JUDGMENT SHOULD NOT ALONE BE GROUNDS FOR REMOVING THE LEGAL CAPACITY OF A PERSON TO MANAGE HIS OR HER OWN PROPERTY OR AFFAIRS.

EXPLANATION

The principle of self-determination is fundamental to a society, like our own, that asserts that it is free and democratic. The exercise of self-determination by an individual can result in situations where he or she makes choices that are quite dissimilar from those that might have been made by many or most other members of the community. The state should not permit the use of laws governing incapacity to manage property to remove the right to self-determination from that individual simply because the choices made by that individual are considered

eccentric. For example, the choice by an individual to renounce the ownership of property by giving away all his or her possessions must be respected. The central issue in determining whether the law governing incapacity should permit intervention is whether or not a particular individual is capable of making a choice or decision. If the person is capable of making a choice, no interference with that choice should be permitted under the laws governing incapacity. Where, however, a person is incapable of making a choice, the state, as protector of the rights of persons incapable of choosing, should provide for the authorization of others to make the necessary choices for that person.

It must be recognized that there are interests of the community that may be given priority in law over the right of an individual to self-determination. An example of this is the rights of persons dependent on an individual for support. Family law legislation is designed to protect spouses and dependants of an individual from failure of that individual to fulfill his or her legal obligations to them. Any inadequacies in that law should be rectified in family law legislation. It is improper to use mental incapacity legislation to serve the needs of dependants or the community.

In this connection, it may be desirable to provide a division or settlement of family assets, under family law legislation, even when the spouses are continuing to co-habit. It may even be desirable to have provisions in family law legislation for interim orders freezing the assets of the family pending a determination. Provisions of this nature would appear desirable if a deferred community property regime is enacted by the legislature. There are a significant number of situations where one

spouse, though capable of managing, is prone to gambling of one kind or another, e.g. stocks, horses. It may be desirable to protect the financial interests of the other spouse without forcing the spouses to live apart. These issues should be examined in connection with other reforms of family law legislation.

The third aspect of this recommendation is that the demonstration of judgment that results in financial loss or poor judgment should not alone be grounds for removing the legal capacity of a person to manage his or her own property or affairs. The Committee feels that a safeguard is necessary to prevent imposing a higher standard on allegedly incapable person than on those of us whose capacities are not in question. People make mistakes. Learning is, at least in part, profiting from our mistakes. Persons of diminished capacity should be free to make mistakes too. The test for incapacity should not be result oriented, that is, the central issue must always be whether a person has made a choice and not whether the results of that choice turned out to be satisfactory.

RECOMMENDATIONS: TEST OF CAPACITY TO MANAGE PROPERTY

- 2 (1) THE CENTRAL STANDARD THAT SHOULD UNDERLIE ALL LEGISLATIVE TESTS OF CAPACITY TO MANAGE PROPERTY IS WHETHER A PERSON CAN UNDERSTAND THE NATURE OF HIS OR HER ACTION OR REFUSAL TO ACT AND CAN APPRECIATE THE CONSEQUENCES OF SO ACTING OR REFUSING TO ACT.
- 2 (2) "UNDERSTAND THE NATURE" MEANS ABLE TO RECEIVE AND EVALUATE SIGNIFICANT INFORMATION RELEVANT TO THE REQUIRED ACTION OR REFUSAL TO ACT.

2 (3) "APPRECIATE THE CONSEQUENCES" MEANS ABLE TO
FORESEE THE RESULTS OF ACTING OR REFUSING TO ACT
THAT ARE REASONABLY FORESEEABLE TO A PERSON OF
ORDINARY UNDERSTANDING.

3 (1) A PERSON SHOULD NOT BE FOUND INCAPABLE OF
MANAGING HIS OR HER PROPERTY UNLESS THE PERSON IS:

(a) UNABLE TO RECEIVE AND EVALUATE SIGNIFICANT
INFORMATION RELEVANT TO A DECISION TO ACT OR
TO REFUSE TO ACT, WITH RESPECT TO HIS OR HER
PROPERTY, OR

(b) UNABLE TO FORESEE THE RESULTS OF ACTING OR
REFUSING TO ACT, WITH RESPECT TO THAT
PROPERTY, WHICH ARE REASONABLY FORESEEABLE
TO A PERSON OF ORDINARY UNDERSTANDING.

3 (2) THE SIGNIFICANT INFORMATION THAT A PERSON SHOULD
BE ABLE TO RECEIVE AND EVALUATE IS:

(a) THE NATURE AND EXTENT OF HIS OR HER PROPERTY;

(b) THE IDENTITY OF THE PERSONS HE OR SHE IS
LEGALLY OBLIGED TO SUPPORT;

(c) THE ACTIONS NECESSARY TO MANAGE THE PERSON'S
PROPERTY (INCLUDING BENEFITS AND INCOME) TO
MAINTAIN THE PERSON AND THOSE LEGALLY
DEPENDENT ON HIM OR HER, OR THE ACTIONS
NECESSARY TO HAVE SOMEONE ELSE MANAGE THE
PROPERTY;

3 (3) THE RESULTS THAT ARE FORESEEABLE TO A PERSON OF
ORDINARY UNDERSTANDING ARE:

(a) THAT, IF THE PROPERTY IS NOT MANAGED, THE PERSON AND HIS OR HER DEPENDANTS MAY NOT BE ABLE TO MAINTAIN THEMSELVES;

(b) THAT THE PROPERTY MAY NOT BE PRESERVED.

3 (4) THE LAW SHOULD NOT REQUIRE THERE TO BE A CONSERVATOR OF PROPERTY FOR A PERSON WHO IS INCAPABLE OF MANAGING BUT HAS NO PROPERTY, FINANCIAL BENEFITS OR INCOME THAT REQUIRE MANAGEMENT.

EXPLANATION

Our society believes that people are or can be morally responsible. Responsible here is used in its sense of properly required to account. The concept of responsibility is based on two assumptions. First, that people know and understand what they do and the consequences that may arise therefrom, and second, that it is appropriate that they bear the consequences of their actions.

The clearest example of the belief in responsibility is the criminal law. Society decides that an action is a threat to it and the state prohibits the action. It also provides penalties for doing the prohibited act. Where the state can prove that a person did the act, we expect that the person will bear the consequences. However, where it is established that the first assumption for a responsible act is not present - that the person did not know the nature and consequence of the action - we do not require that the person bear the penalty or consequences.

The belief that people are or can be responsible is fundamental to our society. It is the basis for the exercise of legal rights and the imposition of obligations upon persons. If a person is mentally capable he or she can exercise legal rights and bear the consequences. Where a person has been found mentally incapable of managing property the law removes both the power to exercise legal rights and removes the obligation to bear the consequences.

The Committee is of the view that no test of capacity to manage property can be justified other than whether a person can understand the nature of his or her actions or refusal to act and can appreciate the consequences of so acting or refusing to act. The state should not permit interference, under laws dealing with capacity, with the powers of a person who meets this test of capacity -- a test of when a decision is responsible and when the decision-maker can be held accountable.

Recommendations 2(2) and 2(3) are the Committee's attempt to make the test of capacity clearer and more objective. Recommendation 2(2) is an effort at making the scope of "understanding the nature" of an action clearer. It is limited to being able to receive and evaluate significant information relevant to the decision. While there remain somewhat subjective elements to the test -- e.g. what is significant -- the Committee believes the definition would be improved by this limitation.

Recommendation 2(3) makes it clear that in order to be able to "appreciate the consequences" of an action or refusal to act a capable person need not measure up to an expert when dealing with a certain type of property. A capable person need only be able to foresee consequences

that can be foreseen by an ordinary person.

The Committee has considered other tests of capacity that are more objective than the proposed test. It is satisfied that the objective tests do not correspond in any real sense to what the community could accept as a test of the capacity to make a responsible decision - a decision for which a person can be held accountable.

One of the issues that concerned the Committee is whether the test for capacity to manage property should take into account the notion of "irresistable impulse". This can be described as a condition where a person's cognitive abilities measure up to the test of a responsible act - he or she can appreciate the nature and consequences of an action - but emotive or volitional facets of the mental process override the judgment. Some jurisdictions accept the existence of irresistible impulse, and give recognition to this phenomenon, in their insanity test for criminal responsibility. Other jurisdictions reject the existence of irresistible impulse. Under Canadian law, the fact that an accused was unable to control his act does not, in itself, constitute a legal defence of insanity.

Should the test of incapacity to manage property somehow recognize the idea that an individual may be unable to conform his behaviour to what he or she knows to be the appropriate action? As a social policy, the Committee has decided that the idea of "irresistable impulse" should not be recognized in the test of capacity to manage property.

Applications for a finding that a person is incapable of managing will seldom, if ever, be brought by a person to have his or her capacity to manage property removed. A

person who is afraid of his or her "irresistable impulse" can take steps to put assets beyond immediate control, for example, by creating a trust that the person cannot revoke but which provides income. "Irresistable impulse" would only be used by others seeking to prevent the individual from using his property in a manner with which they disagree. The Committee believes that "irresistable impulse" could be used to deprive an individual of self-determination and to force individuals to conform to what "reasonable persons" would do with their property.

The Committee has also considered and rejected the test of "reasonableness" for decision-making found in incapacity legislation in Alberta. It believes a test of reasonableness of decisions is a fundamental encroachment on the right of individuals to self-determination. Reasonableness as a test is the imposition of a community standard on the actions of an individual. In the Committee's view, an individual should be free to be unreasonable in dealing with his or her property provided that he or she can understand the nature and consequences of the action, that is, when the person is making a choice or responsible decision. As noted earlier, it is quite appropriate for laws other than the law governing capacity to prevent the person from making choices with respect to his or her property that are harmful to those the individual is obliged to support. In adopting a test of understanding the nature of an action and appreciating its consequences, the Committee is rejecting any result oriented test.

The standard of incapacity to manage, set out in Recommendation 3(1), is an application of the general test or standard of capacity, that is, "whether a person can understand the nature of his or her action or refusal to

act and can appreciate the consequences of so acting or refusing to act".

The Committee is of the view that the most significant information that a capable person must receive and evaluate in making a decision to act or refusal to act is set out in Recommendation 3(2). If a person does not understand the nature and extent of his or her property, it is difficult to believe that the person is making a choice with respect to property, in any meaningful sense. Similarly, a choice in dealing with property made in the absence of the knowledge of the identity of the persons whom he or she is legally obliged to support, is not a real choice. While a capable person can choose to disregard the interests of those he or she is legally obliged to support, it is difficult to accept a decision with respect to property made without knowledge of the identity of those persons. Finally, the Committee believes that a real choice cannot be made unless the person is able to receive and evaluate the actions necessary to manage his or her property and to maintain him or herself and dependent persons; or, in the alternative, how to appoint someone to take those actions with respect to the property. If any of these crucial pieces of information cannot be received and evaluated, it is the Committee's view that the action by a person is not a choice.

Any action or choice has many consequences. The Committee has chosen to focus on the two simplest consequences of financial actions, results that should be foreseeable to a person of ordinary understanding. In order to be truly making a choice, the capable person must appreciate that, if actions are not taken, the person and his or her dependants may not be able to maintain themselves. A

capable person should also be able to foresee that the property may not be preserved. It is possible that a capable person may deal with his or her property and appreciate that the result of certain actions will be that their dependants will not be supported, and that the property will not be preserved. So long as the person is capable of appreciating and foreseeing these consequences, the state should not interfere to prevent those actions being taken under the laws dealing with incapacity.

RECOMMENDATION: ONE STATUTE AUTHORIZING SUBSTITUTE
DECISION-MAKING

- 4 ONE STATUTE SHOULD GOVERN ALL THE LEGAL MECHANISMS FOR SUBSTITUTE DECISION-MAKING, INCLUDING: POWERS OF ATTORNEY; THE CIVIL EFFECTS OF MEDICAL CERTIFICATION OF INCAPACITY TO MANAGE PROPERTY UNDER THE MENTAL HEALTH ACT, SUCH AS THE POWERS AND DUTIES OF STATUTORY CONSERVATORS; JUDICIAL DETERMINATION OF INCAPACITY TO MANAGE PROPERTY AND THE APPOINTMENT OF A CONSERVATOR; JUDICIAL DETERMINATION OF INCAPACITY TO MEET ESSENTIAL REQUIREMENTS FOR PHYSICAL HEALTH OR SAFETY AND THE APPOINTMENT OF GUARDIANS OF THE PERSON. THE STATUTE SHOULD NOT GOVERN THE ACTUAL MEDICAL CERTIFICATION OF PERSONS AS INCAPABLE OF MANAGING WHICH SHOULD CONTINUE TO BE GOVERNED BY PART III OF THE MENTAL HEALTH ACT. THE STATUTE ALSO SHOULD NOT GOVERN CIVIL COMMITMENT OF INDIVIDUALS WHO ARE SUFFERING A DISORDER THAT MAKES THEM DANGEROUS TO THEMSELVES OR OTHERS. CIVIL COMMITMENTS SHOULD ALSO CONTINUE TO BE GOVERNED BY THE MENTAL HEALTH ACT. THE NEW OMNIBUS STATUTE SHOULD BE ENTITLED THE SUBSTITUTE DECISIONS AUTHORITY ACT.

EXPLANATION

The legislation providing for substitute decision-making responds to the dilemma faced by many individuals - the incapacity to decide. As noted earlier, the Committee believes that the existing statutes governing substitute decision-making related to property do not provide a coherent approach because the relationship of one to another, in other than a technical legal sense, was not considered. If each of the statutes was revised to conform to the central principles set out in the report but the provisions were left in separate statutes, the process of amendment in the future inevitably will result in the central principles and the relationship of the statutes being forgotten. To avoid this, the Committee believes that the provisions regarding substitute decision-making should be in one statute.

If these provisions are in one statute those who must consider what procedure to follow could then find the whole range of options in one place. The same statute should also contain sections providing for a substitute decision-maker where individuals are incapable of making decisions related to the essential requirements for their physical health or safety - personal guardianship.

In the Committee's view, the law governing the activities of doctors in psychiatric facilities, that is, the actual certification process under Part III of the Mental Health Act of persons incapable of managing should remain in that statute and should remain in the jurisdiction of the Ministry of Health. The civil consequences of certification should be in the omnibus Substitute Decisions Authority Act.

PART II -- DURABLE POWERS OF ATTORNEY

Some Background

A power of attorney is a written authority given by one person, the donor, to another, the attorney, that gives the attorney the legal power or capacity to do what the giver could do. A power of attorney is a form of agency. A power of attorney can be limited, for example, to pay taxes and other bills, or it can be general, to perform all the property transactions that the donor could perform him or herself.

Until 1979, a person was legally unable to create a power of attorney that would permit an attorney to act when the giver of the power, the donor, lost the mental capacity to act. Simply put, when the donor became mentally incapable of managing his or her property, for example, understanding his or her bills and banking transactions, the attorney could not legally continue to act. While the historic legal rule was justifiable -- the attorney is an agent of the donor and there will be no one to direct and control the attorney when the donor is incapable of doing so -- it was found impractical.

Unlike earlier times, when family could and did act informally to support those who became mentally disabled, almost everyone today has some property or benefits that require actions be taken on their behalf by someone with legal authority. Old age and other pensions, family benefits, and other social security measures require someone to perform legal transactions. The amounts involved may not be large, but some activities such as banking, must be done formally. Modern society creates demands for legal formality. Improvements in medical care

have resulted in more persons living to old age, in both good and bad health.

In 1979, the Powers of Attorney Act was changed to permit a donor to put a special provision in a power of attorney that would permit the attorney to continue to act after the donor has become mentally incapable of acting. The provision did not permit the attorney to continue to act if the donor was certified by a doctor as incapable of managing his or her property under the Mental Health Act. In that case, the Public Trustee, a public official, took over the management of the property.

In 1983, the Legislature, in response to the demand from the community, once again changed the Powers of Attorney Act. Now, the donor's attorney may continue to act after the donor of the power has been medically certified as incapable of managing his or her own property, if the donor of the power:

- . has provided in the power of attorney that the power may be exercised during the legal incapacity of the person;
- . has also provided in the power of attorney that the Public Trustee is not to take over the management of his or her property, even if the donor is medically certified under the Mental Health Act to be incapable of managing his or her property, and
- . the attorney files a copy of the power of attorney with the Public Trustee after a doctor at a medical health facility has certified the donor's incapacity to manage his or her property.

No power of attorney survives a court finding of incompetence or incapacity to manage property under the Mental Incompetency Act.

This special type of power of attorney can appropriately be called a durable power, since it endures mental incapacity and medical certification of incapacity to manage property under Part III of the Mental Health Act. The name durable power of attorney is frequently used in describing this special power of attorney that has been created by legislation in various jurisdictions throughout North America.

It should be noted that the 1983 amendment to the Powers of Attorney Act did not apply to medical certification of mental incompetency to manage property under the Developmental Services Act. A power of attorney becomes ineffective when a certificate of incompetency is issued under that Act even where the power of attorney includes the special clauses permitted by the 1979 and 1983 amendments to the Powers of Attorney Act.

Problems with Durable Powers of Attorney

The benefit of the new law creating the durable power of attorney is that families can assist their members who become mentally incapable of managing their own property. A person who has fears of declining capacity to manage his or her property can make timely and appropriate arrangements. Safeguards can be placed in the power of attorney to meet the concerns that the donor may have. A family member, business associate, professional, or trust company can be appointed to manage the property when the person becomes mentally incapable. While the donor

retains mental capacity, he or she may continue to manage their own property. The dignity of the person who becomes incapable of financially managing is maintained. The state and its officials are not significantly involved.

A major problem that appears to exist is how to prevent the signing of a durable power when the donor is incapable of understanding the nature and consequences of the document. While many individuals create durable powers of attorney when they fully appreciate the nature of their property and the effect of creating a durable power, frequently this is not the case.

A number of durable powers of attorney have been filed with the Public Trustee where the power of attorney has been signed immediately before the purported donor of the power is medically certified, at a mental hospital, as incapable of managing his or her property. While situations in which a person is mentally capable on one day and medically certifiable as incapable of managing their property the next are known to exist, the number of powers of attorney filed where this appears to be the explanation is suspiciously high. While, in law, no power of attorney exists where the person creating it does not understand the nature and consequences of the document being signed, it is difficult and costly to attack the legal validity of a durable power of attorney.

At present, the only formality required in creating a durable power is that the signing be witnessed by a person who is not the attorney or the attorney's spouse. It would appear desirable, because the attorney's authority stems solely from the capacity of the donor and because the consequences of creating a durable power of attorney are so significant, to increase the probability that a

person signing a durable power of attorney understands the nature and consequence of his or her act.

The second perceived problem is that there does not appear, under the existing law, to be an effective, cost-efficient mechanism for directing attorneys acting under a durable power to manage the property only in the best interests of the donor. The existing law provides that there can be application to the court to force the attorney to pass his or her accounts and there is also provision for an application to the court to substitute attorneys. For an application to the court for an accounting to be successful, however, it is necessary for the person bringing the application to produce significant evidence that the attorney is acting inappropriately. It would present some difficulty for anyone to obtain this evidence.

It must be recognized that there is a strong temptation for the attorney managing the property under a durable power to respond to the needs of other family members. This may result in the attorney ignoring his duty to the donor. Where, as sometimes occurs, the donor recovers mental capacity to manage, the property may be found to have been distributed. While legal action against the attorney is possible, financial recovery is unlikely. Moreover, the social costs of the destruction of the family are too great. Ideally, the law would exert sufficient pressure on the attorney acting under a durable power to avoid the attorney surrendering to the temptation to treat the donor's property as though the donor had died.

The Advisory Committee has addressed these problems both directly and indirectly. Its recommendations set out below are designed to tighten up the creation and use of

durable powers of attorney without destroying their usefulness. Equally as important, the Committee has attempted to eliminate any need to inappropriately use durable powers of attorney through:

- 1) its recommended revision of the civil effects of medical certification that would permit family members, instead of the Public Trustee, to administer the property of a person medically certified under the Mental Health Act as incapable of managing his or her property (see Part III of this Report); and
- 2) its recommended revision of the Mental Incompetency Act which is designed to create a simple, inexpensive system for court certification of incapacity to manage (see Part IV of this Report).

RECOMMENDATION: CAPACITY OF DONOR

- 5 THE LEGISLATION GOVERNING POWERS OF ATTORNEY SHOULD PROVIDE THAT A POWER CAN ONLY BE GIVEN WHEN THE DONOR HAS CAPACITY TO UNDERSTAND THE NATURE OF HIS OR HER ACTION OR REFUSAL TO ACT AND TO APPRECIATE THE CONSEQUENCES OF SO ACTING OR REFUSING TO ACT.

EXPLANATION

"Legal capacity" is defined in clause 1(b) of the Powers of Attorney Act to have a corresponding meaning to "legal incapacity" which is defined to mean:

"Mental infirmity of such a nature as would, but for this Act, invalidate or terminate a power of attorney".

It is unclear from the case law which test of the several types of capacity developed by the court in connection with different types of actions, e.g. contracts, wrongful acts (torts), capacity to make a will (testamentary capacity), would apply to powers of attorney. Powers of attorney can be granted in a contractual situation, that is, where consideration passes or where there is a material benefit to the donor of the power and the attorney. A power of attorney can also be created where there is no contract, that is, where there is no material benefit to the attorney or where there is no promise by the attorney to act in that capacity. Therefore, it seems desirable to establish a test of the capacity to create a power of attorney.

Powers of attorney are often used in connection with business and personal affairs. Most powers of attorney do not, and are not intended to, survive the legal incapacity of the donor of the power. For example, a person leaving on a trip may create a limited power of attorney for the payment of various bills. These powers of attorney terminate when the donor no longer has capacity to manage his or her property.

The general test of capacity for all powers of attorney should be the same as other legislative tests of capacity set out in Recommendation 2(1). The witnessing requirements that form a major part of the Committee's recommendations for safeguarding durable powers should not apply to ordinary powers of attorney. The fear with durable powers results from their nature, that is, that they are intended to, and do, survive incapacity to manage property. It is difficult to challenge a durable power after it is created because of this situation. An ordinary power is terminated when the donor becomes incapable.

RECOMMENDATION: SAFEGUARD OF CAPACITY -- WITNESSING

- 6 (1) AS A SAFEGUARD WITH RESPECT TO DURABLE POWERS OF ATTORNEY, THAT IS, POWERS OF ATTORNEY THAT WILL CONTINUE AFTER THE LEGAL INCAPACITY OF THE DONOR AND THE MEDICAL CERTIFICATION UNDER THE MENTAL HEALTH ACT OF THE DONOR AS INCAPABLE OF MANAGING HIS OR HER OWN AFFAIRS, THE LIST OF PERSONS PROHIBITED FROM BEING WITNESS TO THE SIGNING OF THE POWER SHOULD BE:
- (a) PERSONS WHO MAY NOT BE INDEPENDENT OF THE ATTORNEY, THAT IS, FAMILY OF THE ATTORNEY WHETHER BY BLOOD, ADOPTION, MARRIAGE AND OTHERS TO WHOM THE ATTORNEY HAS DEMONSTRATED A SETTLED INTENTION TO TREAT AS HIS OR HER SPOUSE OR CHILD;
 - (b) PERSONS WHO MAY NOT BE INDEPENDENT OF THE DONOR, THAT IS, FAMILY OF THE DONOR, WHETHER BY BLOOD, ADOPTION, MARRIAGE AND OTHERS TO WHOM THE DONOR HAS DEMONSTRATED A SETTLED INTENTION TO TREAT AS HIS OR HER SPOUSE OR CHILD;
 - (c) OFFICERS, AGENTS AND EMPLOYEES OF A FACILITY AT WHICH A PERSON RECEIVES BOARD OR OTHER PERSONAL CARE AND IN WHICH THE DONOR RESIDES;
 - (d) PERSONS INVOLVED IN LITIGATION AGAINST THE DONOR AT THE TIME THE POWER IS SIGNED;
 - (e) A PERSON WHO HAS A CONSERVATOR OF HIS OR HER PROPERTY.

6 (2) A WITNESS TO A DURABLE POWER OF ATTORNEY SHOULD
 BE SATISFIED THAT THE DONOR OF THE POWER
 UNDERSTOOD THE NATURE AND CONSEQUENCES OF THE
 POWER OF ATTORNEY THAT WAS CREATED. AS PART OF A
 DURABLE POWER OF ATTORNEY THE WITNESS SHOULD BE
 REQUIRED TO MAKE A STATUTORY DECLARATION OF HIS
 OR HER BELIEF IN THE LEGAL CAPACITY OF THE DONOR.

6 (3) TO BE SATISFIED THAT THE DONOR UNDERSTANDS THE
 NATURE OF A DURABLE POWER OF ATTORNEY, THE
 WITNESS SHOULD BE SATISFIED THAT THE DONOR IS
 ABLE TO RECEIVE AND EVALUATE THE RELEVANT
 SIGNIFICANT INFORMATION, BEING:

 (a) THE NATURE AND EXTENT OF THE DONOR'S
 PROPERTY;

 (b) THAT THE DONOR IS GIVING ANOTHER PERSON, THE
 ATTORNEY, CONTROL OVER ALL OR PART OF HIS OR
 HER PROPERTY, SO THAT THE ATTORNEY WILL BE
 ABLE TO DO ANYTHING WITH THE PROPERTY THAT
 THE DONOR CAN DO.

6 (4) TO BE SATISFIED THAT THE DONOR UNDERSTANDS THE
 CONSEQUENCES OF A DURABLE POWER OF ATTORNEY, THE
 WITNESS SHOULD BE SATISFIED THAT THE DONOR IS
 ABLE TO FORESEE THE RESULTS OF CREATING A DURABLE
 POWER THAT ARE FORESEEABLE TO A PERSON OF
 ORDINARY UNDERSTANDING, BEING:

 (a) THAT IF THE DONOR BECOMES INCAPABLE OF
 MANAGING HIS OR HER PROPERTY, THE ATTORNEY
 WILL STILL BE ABLE TO MANAGE THE PROPERTY,
 AND

(b) THAT, IN MANAGING THE PROPERTY, THE ATTORNEY WOULD BE ABLE TO DO THINGS WITH THE PROPERTY THAT THE DONOR MIGHT NOT LIKE.

6 (5) LEGISLATION IMPLEMENTING THESE PROPOSALS MUST HAVE TRANSITIONAL PROVISIONS TO AVOID CREATING PROBLEMS FOR DONORS WHO HAVE CREATED DURABLE POWERS OF ATTORNEY UNDER THE EXISTING LEGISLATION.

EXPLANATION

Recommendation 6 reflects the Committee's belief that an incapable donor requires greater protection than exists at present against being victimized by a durable power of attorney that he or she has signed without appreciating the nature and consequences of the document. The more stringent witnessing provisions are intended as a major safeguard against the improper use of a durable power.

The Committee considered a medical declaration or opinion regarding the capacity of the donor, but rejected it because of the cost and inconvenience of obtaining an opinion of this nature. Instead of a doctor's opinion, the Committee has recommended that the witness be required to declare his or her belief that the donor understands that nature and consequences of the power of attorney that he or she is creating. To assist the witness, the legislation and regulations should provide guidance to a witness in arriving at the opinion to be attested to in the statutory declaration.

Recommendations 6(3) and (4) are intended to give assistance to the legislative counsel in developing the legislation.

The Committee recommends that the statutory declaration be consistent with the following approach:

- (a) I am a subscribing witness to the attached durable power of attorney and I was present and saw it signed at, Ontario by the donor, ... on the day of, 19.. .
- (b) that as a result of communication between the donor and myself , immediately before the donor signed the attached power of attorney, I believe the donor understood the nature of the power of attorney including:
 - (i) the extent of property of the donor to which the power of attorney applies;
 - (ii) that the power of attorney confers on the donor's attorney, the right to manage the property in accordance with the terms of the powers of attorney;
 - (iii) that the attorney may continue to manage the property after the donor becomes incapable of doing so.
- (c) I believe that the donor understood the consequences of signing this power of attorney.

Recommendation 6(1) is intended to prevent those persons who are not independent of the donor or the attorney from being witnesses to the creation of the power of attorney or its revocation. The Committee is aware that the class

of persons that is prohibited from acting as witnesses must be very clear, so that the intention of a competent donor to create a durable power will not be frustrated.

Those who are not independent of the donor or attorney may be suspected as having a conflict of interest that might result in a dishonest declaration. While, in many cases this would not be true, the Committee believes that the donor's interest would be best served by having a person who is perceived to be an objective witness.

The Committee is aware of the need to balance the protection of an incapable donor against the need to retain durable powers as a convenient device available to a person who is concerned about a possible future loss of capacity. If the creation of a durable power is made too difficult, the device will not meet the needs of the community. In attempting to devise the most appropriate safeguard, the Committee believes that requiring an independent witness will cause sober second thought for those who might consider abusing durable powers. The requirement of having the witness sign a statutory declaration should impress upon the witness the gravity of the situation. While it would be possible to establish other or fewer safeguards, the Committee believes that its recommendations, if implemented, would result in durable powers remaining a practical tool but remove some of the dangers to donors that now exist.

RECOMMENDATION: REVOCATION OF POWER OF ATTORNEY

- 7 (1) AS AT PRESENT A CAPABLE DONOR SHOULD BE ALLOWED
TO REVOKE AN ORDINARY POWER OF ATTORNEY.

- 7 (2) A REVOCATION OF A DURABLE POWER OF ATTORNEY
 SHOULD BE SUBJECT TO THE SAME FORMALITIES AS ITS
 CREATION.
- 7 (3) A SIMILAR CLASS OF PERSONS SHOULD BE EXCLUDED
 FROM WITNESSING A REVOCATION OF A DURABLE POWER
 AS ARE EXCLUDED FROM WITNESSING ITS SIGNING.
- 7 (4) A WITNESS TO THE REVOCATION OF A DURABLE POWER OF
 ATTORNEY SHOULD BE SATISFIED THAT THE PERSON
 REVOKING UNDERSTANDS THE NATURE AND CONSEQUENCES
 OF THE REVOCATION. THE WITNESS SHOULD BE
 REQUIRED TO MAKE A STATUTORY DECLARATION OF HIS
 OR HER BELIEF IN THE LEGAL CAPACITY OF THE DONOR
 THAT WOULD BE PART OF THE REVOCATION.
- 7 (5) TO BE SATISFIED THAT THE PERSON REVOKING THE
 DURABLE POWER OF ATTORNEY UNDERSTANDS THE NATURE
 OF THE REVOCATION, THE WITNESS SHOULD BE
 SATISFIED THAT THE PERSON REVOKING IS ABLE TO
 RECEIVE AND EVALUATE THE SIGNIFICANT INFORMATION
 RELEVANT TO THE REVOCATION, BEING THAT THE PERSON
 REVOKING IS REMOVING ALL AUTHORITY OF THE
 ATTORNEY TO MANAGE HIS OR HER PROPERTY.
- 7 (6) TO BE SATISFIED THAT THE PERSON REVOKING THE
 DURABLE POWER OF ATTORNEY UNDERSTANDS THE
 CONSEQUENCES OF A REVOCATION, THE WITNESS SHOULD
 BE SATISFIED THAT THE PERSON REVOKING IS ABLE TO
 FORESEE THE RESULTS OF REVOCATION THAT ARE
 FORESEEABLE TO A PERSON OF ORDINARY UNDERSTANDING
 BEING THAT UNLESS THE DONOR IS ABLE TO MANAGE HIS
 OR HER OWN PROPERTY OR APPOINT SOMEONE ELSE TO
 MANAGE THE PROPERTY, THE PROPERTY MAY NOT BE
 PRESERVED.

EXPLANATION

Recommendation 7(1) reflects the Committee's view that the donor of an ordinary power of attorney should be able to revoke it at will. It is terminated by operation of law when the donor becomes mentally incapable.

Recommendation 7(2) deals with the issue of the formalities surrounding the revocation of a durable power of attorney. Section 7 of the existing Powers of Attorney Act provides that a durable power of attorney may be revoked by the donor at any time when he has legal capacity. By defining legal capacity more clearly in the legislation, some light will be cast on when a durable power of attorney may be revoked. However, both the creation of durable powers and their revocation will frequently not be attended by detailed understandings of the niceties of law. Therefore, the Committee believes that this law should be as easy to understand and use as possible.

It is contemplated that persons who have legal capacity and are choosing to create a durable power of attorney will do so under circumstances where they wish to protect themselves from their own future incapacity and from their own future irrational acts. In short, a donor who has created a durable power of attorney should not be able to revoke that document at a time when the donor is incapable of sustaining his or her attention and directing it to the issue at hand. Therefore, the written revocation should be accompanied by a declaration of a witness similar to that required of a witness to the creation of the power of attorney.

Recommendation 7(5) and 7(6) are designed to give guidance

to the legislative counsel drafting the legislation. The Committee suggests that the statutory declaration of a witness to a revocation of a durable power of attorney should contain the following elements:

- (a) I am a subscribing witness to the attached revocation of power of attorney, and I was present and saw it signed on the day of, 19.., at, Ontario, by and as a result of communication between and myself immediately before signed the attached revocation of power of attorney, I believe that understood the nature of the revocation of power of attorney, including:
 - (i) that was revoking a power of attorney dated the day of, 19.., by which was appointed attorney to manage the property of in accordance with the terms of that power of attorney;
 - (ii) that the power of attorney being revoked contained a provision that authorized the attorney to continue to manage the property after became incapable of managing it;
 - (iii) that signing the attached revocation of power of attorney immediately terminated the power of attorney;

- (b) and I believe that
understood the consequences of signing this
revocation, one of which is that unless
..... is able to manage the
property or appoint someone else to manage it,
the property may not be cared for.

It is contemplated by the Committee that a revocation of a power of attorney could take place even after the donor of the power of attorney has been certified as incapable of managing his or her own affairs under the Mental Health Act. It is possible that a donor could be capable of understanding the nature and consequences of a revocation but still be incapable of managing his or her property. The revocation of a power of attorney at that time by the donor of the power should result in a statutory conservator taking over the management of the property of the person medically certified as incapable of managing his own property. If Recommendation 6(1)(e) is implemented, a person who has a statutory or court-appointed conservator would not be capable of witnessing the revocation of a durable power of attorney.

The Committee seriously considered requiring that revocation after a donor is certified as being incapable of managing his or her own property and affairs under the Mental Health Act be accompanied by a declaration or opinion of a medical doctor to the effect that the person has the capacity to revoke. However, the Committee rejected this idea because it would both increase the workload of doctors in mental health facilities and require that the decision to refuse to give the opinion that the person was capable should be appealable. In short, the idea of involving medical doctors was rejected

because it would involve unnecessary cost and cumbersome procedures.

Once a certificate of incapacity to manage property has been issued and delivered to the Public Trustee, the Public Trustee will manage the property unless the attorney files a copy of the durable power of attorney with the Public Trustee. Therefore, a revocation made after the issuance of a certificate of incapacity to manage property could only be effective if filed with the Public Trustee.

RECOMMENDATION: PRESUMPTION OF VALIDITY OF POWER
OF ATTORNEY

8 WHERE A DURABLE POWER OF ATTORNEY HAS BEEN SIGNED AND WITNESSED IN THE STATUTORY FORM, THERE SHOULD BE A PRESUMPTION OF ITS VALIDITY AND, THEREFORE, THE LEGAL CAPACITY OF THE DONOR, IN THE ABSENCE OF PROOF TO THE CONTRARY.

EXPLANATION

Recommendation 8 would make it clear that a durable power, created in the manner recommended, is not to be easily set aside. The presumption of the donor's competence at the time the power is created is supported by the declaration of the witness. The onus of proving invalidity of the power and the incapacity of the donor should be on anyone attacking the durable power.

RECOMMENDATION: PROTECTING INNOCENT PERSONS WHO RELY
ON POWER

9 THE LEGISLATION GOVERNING DURABLE POWERS OF ATTORNEY SHOULD BE AMENDED TO MAKE IT CLEAR THAT WHEN ANY POWER OF ATTORNEY, INCLUDING A DURABLE POWER OF ATTORNEY, IS TERMINATED, REVOKED, OR BECOMES INVALID BY COURT ORDER, ANY SUBSEQUENT EXERCISE OF THE POWER OF ATTORNEY IS VALID AND BINDING, AS BETWEEN THE DONOR, OR THE ESTATE OF THE DONOR, AND ANY PERSON, INCLUDING THE ATTORNEY, WHO ACTED IN GOOD FAITH AND WITHOUT KNOWLEDGE OF TERMINATION, REVOCATION OR INVALIDITY.

EXPLANATION

Recommendation 9 relates to a technical concern with respect to the wording of the Powers of Attorney Act. An amendment to implement this recommendation was introduced as a bill in the 1984 session of the legislature. However, the amendment was not enacted. The Committee believes that it should be.

Subsection 3(1) of the Powers of Attorney Act was enacted in 1979 to remedy a problem with the common law applicable to powers of attorney. At common law, the authority of an attorney (agent) is coincidental with the capacity of the donor (principal). When the capacity of the donor ends through an event, e.g. death or legal incapacity, the actual authority of the agent ends; that is to say, the power of attorney is terminated.

In practice, this is a rule that is unfair to attorneys and third parties who rely on the authority in ignorance of its termination. This rule was changed by subsection

3(1) so that parties, including the attorney, acting in good faith and ignorant of the termination, should be able to continue to rely on the document. There is doubt that the new rule in subsection 3(1) of the Powers of Attorney Act applies in the circumstances set out in section 8, when a committee is appointed by the court under the Mental Incompetency Act or when the power is revoked by the donor or by operation of law.

As a consequence of this uncertainty, some banks have been unwilling to accept a durable power of attorney in statutory form. This frustrates the public policy underlying the Powers of Attorney Act. It also frustrates the intention of donors of powers relying on that law. This is unfortunate. The Act should be amended to affect the policy of subsection 3(1).

RECOMMENDATIONS: NEW DUTIES OF ATTORNEY UNDER
DURABLE POWERS

- 10 (1) AN ATTORNEY WHO INTENDS TO CONTINUE TO ACT UNDER A DURABLE POWER OF ATTORNEY AFTER THE DONOR OF THE POWER HAS BEEN MEDICALLY CERTIFIED UNDER THE MENTAL HEALTH ACT AS INCAPABLE OF MANAGING HIS OR HER PROPERTY, SHOULD CONTINUE TO BE REQUIRED TO FILE PROOF OF THE POWER OF ATTORNEY CONTAINING THE RELEVANT CLAUSES AND NOTICE OF HIS OR HER INTENTION TO MANAGE ALL OF THE ESTATE BY MEANS OF THE POWER OF ATTORNEY.
- 10 (2) AN ATTORNEY WHO HAS FILED AND GIVEN NOTICE TO THE PUBLIC TRUSTEE OF INTENTION TO MANAGE THE ESTATE, AND ANY OTHER ATTORNEY ACTING UNDER A DURABLE POWER WHO IS UNABLE TO OBTAIN DIRECTIONS FROM THE

DONOR REGARDING THE MANAGEMENT OF THE ESTATE,
SHOULD BE SUBJECT TO THE FOLLOWING DUTIES WHICH
ARE SIMILAR TO THE DUTIES RECOMMENDED FOR
STATUTORY AND COURT-APPOINTED CONSERVATORS:

- (a) THE STANDARD OF CARE SET OUT IN
RECOMMENDATION 34;
- (b) THE DUTY TO ACT IN GOOD FAITH AND SOLELY IN
THE INTERESTS OF THE PERSON INCAPABLE OF
MANAGING, AS SET OUT IN RECOMMENDATION 35;
- (c) EXCEPT WHERE THE LIMITATIONS EXPRESSED IN
THE POWER OF ATTORNEY ARE IN CONFLICT
THEREWITH, THE DISTRIBUTIVE DUTIES SET OUT
IN RECOMMENDATION 36.

11 (1) WHERE THE DONOR OF A DURABLE POWER OF ATTORNEY
HAS BEEN MEDICALLY CERTIFIED UNDER THE MENTAL
HEALTH ACT AS INCAPABLE OF MANAGING HIS OR HER
PROPERTY, AND THE ATTORNEY HAS PROVEN THE POWER
AND GIVEN NOTICE TO THE PUBLIC TRUSTEE OF HIS OR
HER INTENTION TO MANAGE THE ESTATE, THE ATTORNEY,
IN ADDITION TO THE OTHER DUTIES, SHOULD HAVE A
DUTY TO PROVIDE ANNUAL NOTICE TO THE DONOR, A
PERSONAL GUARDIAN OF THE DONOR, IF THERE IS ONE,
AND THE PUBLIC TRUSTEE THAT, ON REQUEST, A
FINANCIAL STATEMENT REGARDING THE MANAGEMENT OF
THE DONOR'S PROPERTY WOULD BE GIVEN TO THEM.

11 (2) THE DONOR, A PERSONAL GUARDIAN OF THE DONOR, IF
THERE IS ONE, AND THE PUBLIC TRUSTEE WOULD HAVE
THE RIGHT TO REQUEST FURTHER PARTICULARS
REGARDING THE MANAGEMENT OF THE PROPERTY OF THE
DONOR.

EXPLANATION

These two recommendations relate to the second major perceived problem with the existing Powers of Attorney Act. There are no statutory duties of an attorney acting under a durable power to ensure the attorney knows that he or she acts in a position of trust, and, as such, the interests of the donor are his or her sole concern. A durable power of attorney is not a document intended to permit the distribution of the donor's estate before his or her death.

The Committee's recommendations are based upon its view that an attorney, acting upon a durable power after the donor of the power is no longer capable of directing the attorney, is in a position very similar to that of a conservator. Under existing law where there has been a determination that a person is incapable of managing his own property, the attorney, in order to continue functioning, must prove the power of attorney to the Public Trustee and must give notice of an intention to manage the property under the power of attorney (s.38(2) of the Mental Health Act). This requirement should be retained.

The attorney, in these circumstances, and any other attorney acting under a durable power who is not able to receive directions and instruction from the donor of the power, should behave in the same manner as a conservator. The attorney, like a non-professional conservator, should be liable to the estate where the attorney fails to exercise the degree of care, diligence and skill that an ordinary, prudent person in business would exercise in conducting that business. Professional attorneys should be required to live up to the higher degree of care,

diligence and skill that their profession dictates. The court should be authorized to relieve the attorney from liability when the attorney has acted diligently, honestly and reasonably but has been in default in some technical way in complying with the duty.

The attorney should also be subject to the duties set out in recommendation 35, to discharge duties and exercise powers in good faith and solely in the interests of the donor. The attorney should not knowingly be in a position in which his or her interest conflicts in any way with the discharge of duties and the exercise of powers. The attorney should not derive any benefit for him or herself or for any other person, except insofar as the distributive duties of an attorney require provision of support to themselves from the estate and so far as a court may permit on application.

Recommendation 36 of this Report, set out in Part VI, deals with the duties of a conservator with respect to the distribution of income and capital of the estate of a person incapable of managing. These duties should apply unless the power of attorney limits the distributive powers of the attorney. For example, a power of attorney may limit the gift-giving ability of the attorney. In that case, and in all others where the powers are restricted so as to prevent the exercise of the distributive duties, the power of attorney must override the distributive directions recommended in this Report.

The implementation of Recommendation 11 would result in an attorney, whose donor had been medically certified as incapable of managing their property under the Mental Health Act, being under a duty to provide notice of willingness to give a financial statement regarding the

attorney's management of the donor's estate. The donor, a personal guardian, if any, of the donor, and the Public Trustee would then be able to demand further financial particulars regarding the administration of the estate. This duty would be similar in substance to the duty of a conservator to provide such information. Those principles are set out in Recommendation 38 in Part VI of this Report. The reason the Committee has recommended the giving of a notice of willingness to provide a financial statement instead of requiring the attorney to give the financial statement to those persons entitled to it, is to protect the estate from having the financial statement fall into the wrong hands.

A statutory form of notice and a simple form of financial statement should be set by regulation. The requirement of an annual filing would be a periodic reminder to the attorney of his or her fundamental obligation to the donor. Failure to file would alert the Public Trustee to possible problems. The Public Trustee would know who is required to file because, for the power of attorney to be effective after the donor is medically certified as incapable of managing, the attorney must prove the power of attorney and give notice of intention to manage the estate.

To preserve the confidentiality of the donor's affairs, the persons entitled to the notice should be the donor, a personal guardian of the donor (because many decisions made by a personal guardian will require expenditure of money from the donor's estate) and the Public Trustee. Those entitled to the financial statement would be given the right to demand more financial information. These provisions should protect the honest and capable attorney by permitting the attorney to divulge the financial

information to a public official in an informal manner. Where the attorney is acting appropriately, there will be less likelihood of the estate being required to incur the expense of a passing of accounts by the attorney.

RECOMMENDATIONS: PASSING OF ACCOUNTS BY ATTORNEY

- 12 IN ADDITION TO THE DONOR'S RIGHT TO DEMAND THAT AN ATTORNEY ACCOUNT TO HIM OR HER, WHERE THE DONOR HAS BEEN MEDICALLY CERTIFIED UNDER THE MENTAL HEALTH ACT AS INCAPABLE OF MANAGING HIS OR HER OWN PROPERTY, THE DONOR, A PERSONAL GUARDIAN OF THE DONOR, THE PUBLIC TRUSTEE, A PERSON WHO IS A LEGAL DEPENDANT OF THE DONOR, A JUDGMENT CREDITOR AND ANY OTHER PERSON PERMITTED BY THE COURT, SHOULD HAVE THE RIGHT TO APPLY TO THE COURT FOR AN ACCOUNTING.
- 13 (1) THE EXISTING PROVISIONS IN THE POWERS OF ATTORNEY ACT PERMITTING PERSONS OTHER THAN THE DONOR TO APPLY TO THE COURT FOR AN ACCOUNTING WHEN THE DONOR HAS NOT BEEN MEDICALLY CERTIFIED UNDER THE MENTAL HEALTH ACT AS INCAPABLE OF MANAGING HIS OR HER PROPERTY SHOULD NOT BE CONTINUED. INSTEAD, THOSE SEEKING AN ACCOUNTING SHOULD APPLY FOR COURT APPOINTMENT OF A CONSERVATOR AND THE COURT SHOULD HAVE THE POWER SET OUT IN RECOMMENDATION 15.
- 13 (2) THE EXISTING PROVISIONS FOR COURT APPOINTMENT OF A SUBSTITUTE ATTORNEY, NOW CONTAINED IN THE POWERS OF ATTORNEY ACT, SHOULD NOT BE CONTINUED. INSTEAD, THERE SHOULD BE APPLICATION TO THE COURT FOR APPOINTMENT OF A CONSERVATOR IN THESE CIRCUMSTANCES.

- 14 WHERE THE DONOR HAS BEEN MEDICALLY CERTIFIED UNDER THE MENTAL HEALTH ACT AS INCAPABLE OF MANAGING HIS OR HER PROPERTY AND AN APPLICATION TO THE COURT HAS BEEN MADE FOR AN ACCOUNTING,
- 14 (1) THE COURT, ON MOTION, SHOULD HAVE POWER TO MAKE AN INTERIM ORDER THAT THE DURABLE POWER OF ATTORNEY IS SUSPENDED PENDING THE OUTCOME OF THE APPLICATION, IN WHICH CASE THE PUBLIC TRUSTEE WOULD BECOME INTERIM STATUTORY CONSERVATOR;
- 14 (2) THE COURT SHOULD BE EMPOWERED TO DECLARE THAT THE DURABLE POWER OF ATTORNEY IS TERMINATED, IN WHICH CASE THE PROVISIONS FOR STATUTORY CONSERVATORSHIP WOULD APPLY.
- 15 WHERE THERE IS A DURABLE POWER OF ATTORNEY BUT THE DONOR HAS NOT BEEN MEDICALLY CERTIFIED UNDER THE MENTAL HEALTH ACT TO BE INCAPABLE OF MANAGING, ON APPLICATION FOR COURT APPOINTMENT OF A CONSERVATOR FOR A DONOR ALLEGED TO BE INCAPABLE OF MANAGING HIS OR PROPERTY, THE COURT, ON MOTION, SHOULD HAVE POWER:
- 15 (1) TO MAKE AN INTERIM ORDER THAT THE DURABLE POWER IS SUSPENDED PENDING THE DETERMINATION OF THE APPLICATION;
- 15 (2) TO ORDER THE ATTORNEY TO PASS ACCOUNTS;
- 15 (3) TO APPOINT THE PUBLIC TRUSTEE, OR OTHER PERSON, AS INTERIM CONSERVATOR PENDING THE OUTCOME OF THE APPLICATION;
- 15 (4) TO ORDER THE PERSONS HAVING CUSTODY OF THE ALLEGED INCAPABLE PERSON PERMIT ACCESS TO THE

PERSON FOR THE PURPOSE OF ASSESSING THE CAPACITY
OF THE PERSON TO MANAGE HIS OR HER PROPERTY;

- 15 (5) TO ORDER THE ALLEGED INCAPABLE PERSON TO SUBMIT
TO AN ASSESSMENT TO DETERMINE HIS OR HER CAPACITY
TO MANAGE PROPERTY.

EXPLANATION

It is necessary when the donor of a durable power is incapable of managing property to have others who can require the attorney to account for his or her dealing with the property. The Committee is not satisfied that the provisions for accounting in the existing legislation are appropriate. Subsection 9(1) of the Powers of Attorney Act provides:

Where a power of attorney contains a provision referred to in section 5 and the donor subsequently is without legal capacity, any person having an interest in the estate of the donor or any other person permitted by the court may, during such incapacity, apply to the surrogate court in the county or district where the donor or the donee resides for an order requiring the attorney to pass his accounts for transactions involving an exercise of the power during the incapacity of the donor, and the court may order the attorney to pass such accounts or such part thereof as is provided in the order.

Where the donor of a durable power of attorney is medically certified under the Mental Health Act as incapable of managing his or her own property, there is a determination under law that the person is incapable of managing property. The court is not required to determine the capacity of the donor, for that capacity has already

been determined. Therefore, the procedure seems appropriate although it is the Committee's view that all application should be to the District Court of Ontario.

The section, however, appears to permit an application to be brought to the court for an accounting when the donor has not been medically certified under the Mental Health Act as incapable of managing his or her own property. To make an order, the court would be required to find the donor legally incapable of managing his or her property. This appears inappropriate. The procedure for determining the capacity of the donor has neither the legal safeguards provided under the Mental Incompetency Act for mental incompetency or incapacity applications, nor the practical safeguards derived from the combination of medical need and professional judgment, applicable under the Mental Health Act in a procedure to certify a person as incapable of managing his or her own property,

It would be far more appropriate, in the Committee's view, that where there has been no medical certification of incapacity to manage, for the application for an accounting to be brought in the context of an application for the appointment of a conservator. All the safeguards of the donor's rights established for an application to determine whether a person is incapable of managing his or her property would then apply. Recommendation 15 would provide additional powers to the court on an application of this nature.

Section 10 of the Powers of Attorney Act provides for substitution of attorneys by the court on application where a durable power of attorney exists and the donor of the power is without legal capacity. This provision also requires the court to determine the capacity of the donor

without the legal safeguards of an incapacity application. In addition, it is the Committee's view that the appointment of an attorney under a durable power is a personal act of the donor. Once it is no longer the donor's choice of attorney who will be managing his or her estate, the law governing powers of attorney has been taken beyond a reasonable limit. Instead of the application being for a court appointment of a substitute attorney, the application should be for an appointment of a conservator.

Recommendations 14 and 15 are intended to give additional powers to the court when considering matters related to an accounting by an attorney under a durable power. Under the existing law, where the donor has been medically certified under the Mental Health Act as incapable of managing his or her property, there can be an application for accounting under the Powers of Attorney Act. However, the court is not given power to suspend the operation of the durable power of attorney pending the outcome of the application for accounting. If there is good reason to believe that the estate is being mismanaged, the court should have this power to prevent further mismanagement. Where the power of attorney is suspended, the Public Trustee would become the interim statutory conservator. Where it is found that there has been mismanagement, the court currently does not have the power to declare that the durable power is terminated. It is the Committee's view that the court should be given this power so that the recommended provisions for statutory conservatorship could apply to the situation.

Where there is a durable power of attorney in existence but the donor has not been medically certified under the Mental Health Act as incapable of managing his or her

property, the Committee has recommended that the provision for accounting should be part of an application for court determination that the donor is incapable of managing his or her property and for the court appointment of a conservator. In this way the civil rights of the donor can be protected.

Experience has shown that it may be difficult for an applicant to obtain information regarding the manner in which the attorney has dealt with the estate and to gain access to the donor who is alleged to be incapable of managing his or her property. It seems necessary to provide the court with sufficient powers to prevent further exploitation of a person who is incapable of managing his or her property. On an application for the appointment of a conservator, the court, on motion, should have power: to make an interim order that the durable power is suspended pending the outcome of the application; to order the attorney to pass his or her accounts; to appoint the Public Trustee or another person as interim conservator pending the outcome of the application; to order that the persons who have custody of the alleged incapable person permit access to that person for the purpose of making an assessment of the capacity of that person to manage his or her property; and, to order the alleged incapable person to submit to an assessment to determine his or her capacity. Where the assets of an incapable donor are being mismanaged, the court could put an early end to the mismanagement. Where, on the other hand, the donor is capable and the application is unfounded, the application could be brought to an early end.

By using the application for a court appointment of a conservator as a mechanism for examination of the

management of the donor's estate by the attorney under a durable power, the court would have all the appropriate powers for protecting the estate of an incapable person. Where the donor was capable of managing his or her own property, the durable power of attorney would continue. Where the donor was incapable of managing his or her own property, the attorney, or some other person, would be appointed conservator. Durable powers of attorney were intended as a simple legal mechanism to allow persons to determine who should manage their property in the event of their incapacity to do so. Once the court process has been invoked during the incapacity of the donor to manage his or her own property, it is appropriate that a conservator be appointed.

PART III - CIVIL EFFECTS OF MEDICAL CERTIFICATION
OF INCAPACITY TO MANAGE PROPERTY

Some Background

Under Part III of the Mental Health Act, a person who is registered in a psychiatric facility may be certified by a doctor to be "incompetent to manage his estate". When the certificate of incompetence is received by the Office of the Public Trustee, a public official, the person's civil right to manage his or her property is removed and the Public Trustee assumes the role of committee or manager of the property. This medical certification of incapacity to manage is designed to, and does, protect the property of persons during a period of medical crisis where action may be necessary to prevent financial loss.

In general, there is little community concern about this procedure. It is appropriate that the procedure can apply to both voluntary and involuntary patients at a psychiatric facility and to outpatients who are attending for observation or are receiving treatment at the facility. However, in some cases, for lack of a cost-effective court procedure for determining incapacity to manage property and appointing a manager, the medical certification procedure is used to certify persons who have no connection with the psychiatric facility other than the registration of their names at the facility and examination by a medical doctor connected with the facility. There is community concern about this. The Committee's recommendations related to the process for obtaining a court-appointed property conservator are designed to remove the need for this extended application of medical certification of incapacity to manage.

The major problem, from the community perspective, with the medical certification of incapacity to manage, relates to its civil effects. As noted earlier, at present, only the Public Trustee can manage the property where a person is medically certified. A spouse or family member who has shared the responsibility of management with the incapable person is not entitled to manage the property, unless there is a durable power of attorney appointing the relative as the incapable person's attorney or the family member applies to the courts and is appointed committee of the incapable person's estate. Reports from the community indicate that this process can cost several thousand dollars. It is this problem that the recommendations set out in this part are designed to remedy.

The term "statutory conservator" is used to describe the person who, under these recommendations, would be empowered by statute to manage the property of a person medically certified as incapable of managing his or her property under the Mental Health Act.

RECOMMENDATION: WHERE STATUTORY PROVISIONS SHOULD BE
SET OUT

- 16 (1) THE PROCEDURE FOR MEDICAL CERTIFICATION AND THE REVIEW OF A MEDICAL CERTIFICATE OF INCAPACITY TO MANAGE PROPERTY SHOULD BE RETAINED IN PART III OF THE MENTAL HEALTH ACT, BUT THE CIVIL EFFECTS OF INCAPACITY TO MANAGE PROPERTY, INCLUDING WHO HAS THE RIGHT TO BE STATUTORY CONSERVATOR AND THE POWERS AND DUTIES OF A STATUTORY CONSERVATOR, SHOULD BE SET OUT IN AN OMNIBUS STATUTE -- THE SUBSTITUTE DECISIONS AUTHORITY ACT.

- 16 (2) THE PROVISIONS FOR MEDICAL CERTIFICATION UNDER THE DEVELOPMENTAL SERVICES ACT SHOULD BE REPEALED AND REPLACED WITH AN ADMINISTRATIVE SCHEME TO EFFECT THE NECESSARY TRANSFER OF FUNDS FROM GOVERNMENT AGENCIES TO FACILITIES FOR THE DEVELOPMENTALLY HANDICAPPED WITHOUT THE RESULT OF REMOVING THE CIVIL RIGHTS OF THE INDIVIDUAL IN QUESTION.

EXPLANATION

It is vital that all aspects of the procedure whereby a medical doctor certifies that a person is incapable of managing his or her property and gives notice of this fact be retained in the Mental Health Act. The medical review of these certificates should also remain in that Act. Since this legislation governs the duties of doctors and other staff, it is appropriate that it be administered by the Ministry of Health.

However, Part III of the Act now also sets out the authority of the Public Trustee acting as statutory conservator or manager of the estate of a person incapable of managing. It provides for the effects of a durable power of attorney, thus splitting the statute law governing durable powers of attorney between two statutes, the Powers of Attorney Act and the Mental Health Act. This is not a totally satisfactory legislative structure but it has been the best that could be done to date.

The recommendations of the Committee regarding changes to the law of statutory conservatorship; common elements with respect to the duties of statutory and court-appointed conservators; the relationship between attorneys under

durable powers and conservators -- all point to the need for an omnibus statute that would provide, as one part, the civil effects of a medical certificate.

Under the Developmental Services Act, there is a certification process whereby a developmentally handicapped person is certified as incompetent to manage his estate. It appears that the primary purpose of these provisions is to effect a transfer of funds from those providing Family Benefit payments to the Public Trustee and, in turn, to the institution where the developmentally handicapped person resides. There appears to be few, if any, situations where there is need to appoint the Public Trustee as committee at this stage because there is no property to be managed other than the benefit payments.

Generally, the application to become a resident in these facilities is anticipated and financial matters are arranged long in advance. The crisis situations dealt with so frequently under the provisions of the Mental Health Act have no application with respect to the situations covered by the Developmental Services Act.

The effect of medical certification under the Developmental Services Act may be a loss of civil rights. The community feels that this is inappropriate. If it is necessary for the government to effect a fund transfer, it should be an administrative scheme set out in the legislation and it should not have the consequence of removing the civil rights of an individual.

RECOMMENDATION: STANDARDIZATION OF TERMINOLOGY

17 THE TERM "INCOMPETENT TO MANAGE HIS ESTATE" IN PART

III OF THE MENTAL HEALTH ACT SHOULD BE REPLACED WITH THE TERM "INCAPABLE OF MANAGING HIS OR HER PROPERTY".

EXPLANATION

"Incompetent" and "incapable" have similar meanings, as do their root words "competent" and "capable". However, under the Mental Incompetency Act, a status of incompetence (mentally incompetent so found) has existed based on a court declaration under the statute. This status appears to remove the general legal capacity of an individual to perform even functions he or she is capable of performing. Perhaps as a result of this legal usage, at present, the word "incompetent" is more frequently used by people to describe a general disability, while the word "incapable" is associated with a specific dysfunction.

Little is known of the relationship between human capabilities and incapacities. What is known is that a disability that prevents someone from making some essential life decisions may not affect that person's abilities to make other decisions related to other functions that the individual is required to perform. The recognition of this fact in its application to the law governing incapacity is called a functional approach. As discussed in Part I of this Report, capacity and incapacity are terms selected by the Committee for use in all of the legislation related to this field of law. It is appropriate that the term used in the Mental Health Act be amended to conform.

RECOMMENDATION: PUBLIC TRUSTEE TO MANAGE INITIALLY

18 WHERE THERE IS CERTIFICATION UNDER THE MENTAL HEALTH ACT OF INCAPACITY TO MANAGE PROPERTY, THE PUBLIC TRUSTEE, AS AT PRESENT, SHOULD IMMEDIATELY BECOME STATUTORY COMMITTEE.

EXPLANATION

As noted earlier, the primary reason for medical certification of incapacity to manage property is to ensure that persons suffering a mental crisis making them incapable of managing their property, have a public official manage it for them. In many cases, the mental crisis will be of short duration. In those cases, it is unlikely that family members or others would be dissatisfied with the Public Trustee managing the property of the incapable person, until such time when the person has regained capacity. However, in some cases, the mental crisis will be more lasting.

The Committee considered and rejected the idea that a medical certificate of incapacity be limited in its operation to a fixed period of time, after which, application should be brought to the court to appoint a conservator. Although this approach would be legally sound and, to some, more procedurally proper, the Committee feels that it would result in an unnecessary expenditure. The method of obtaining a court appointment of a conservator, without hearing, recommended in Part IV of this Report, would not be excessively expensive. When mental incapacity to manage property is to continue for a significant period of time, it should be possible

for others to replace the Public Trustee as statutory conservator.

RECOMMENDATION: DESIGNATED STATUTORY CONSERVATOR

- 19 (1) A PERSON WHO HAS CAPACITY TO DO SO, SHOULD HAVE THE RIGHT TO DESIGNATE, IN WRITING, THE PERSON, INCLUDING A TRUST COMPANY, OR THE PUBLIC TRUSTEE THAT THEY WANT TO BE THEIR STATUTORY CONSERVATOR (OR WOULD LIKE TO HAVE THE COURT APPOINT AS A CONSERVATOR) IN THE EVENT THAT THE PERSON BECOMES INCAPABLE OF MANAGING PROPERTY.
- 19 (2) THE DESIGNATED PERSON WOULD HAVE THE HIGHEST PRIORITY OF THOSE WHO MAY REPLACE THE PUBLIC TRUSTEE AS STATUTORY CONSERVATOR.
- 19 (3) TO BE EFFECTIVE, A WRITTEN DESIGNATION WOULD BE REQUIRED TO BE WITNESSED BY A PERSON WHO WOULD MAKE A STATUTORY DECLARATION OF HIS OR HER BELIEF THAT THE PERSON MAKING THE DECLARATION HAD THE CAPACITY TO DESIGNATE. THE FORMALITIES FOR THE DESIGNATION OF A STATUTORY CONSERVATOR SHOULD BE SIMILAR TO THOSE GOVERNING A DURABLE POWER OF ATTORNEY.
- 19 (4) TO BE EFFECTIVE, REVOCATION OF A DESIGNATION WOULD BE REQUIRED TO BE WITNESSED BY A PERSON WHO WOULD MAKE A STATUTORY DECLARATION OF HIS OR HER BELIEF THAT THE PERSON REVOKING THE DESIGNATION HAD CAPACITY TO DO SO. THE FORMALITIES FOR REVOKING A DESIGNATION SHOULD BE SIMILAR TO THOSE THAT WOULD APPLY TO THE REVOCATION OF A DURABLE POWER OF ATTORNEY.

EXPLANATION

One principle underlying this Report is that the law governing the management of property of incapable persons should permit individuals to exercise, while they are capable, the maximum control possible over their lives. Self-determination should extend to making choices, while capable, that will govern their affairs when they lose capacity. Of course, the choices made cannot always be acted on due to changes in circumstances. Once incapable of making decisions, the person cannot take new circumstances into account. Nevertheless, where it is reasonable to do so, the decisions should be respected.

Therefore, a person should be given the legal right to designate another to be his or her statutory conservator in the event that he or she becomes incapable of managing property. The designation of a statutory conservator should have the effect of giving the designated person priority for consideration where a court appoints the conservator. It is contemplated that the legislation will encompass situations where the person is able to designate an alternative statutory conservator.

This device would be a useful alternative to creating a durable power of attorney. Like a durable power of attorney, it would be a means of dealing with property and affairs in the event of mental incapacity. Its advantage over a durable power of attorney, at least those in general use, is that it would not give authority to deal with property until there was a finding of incapacity to manage property either through medical certification under the Mental Health Act or by a court. This would also be its major drawback. It could not be used as a device to

gradually turn over control of a person's affairs to another.

The recommendations of the Committee with respect to the duties of a conservator set out in Part VI of this Report, would constrain the conservator to deal with the incapable person's property in a manner that would reflect the legal duties, needs and feelings of the incapable person.

The same formalities recommended with respect to the creation and revocation of a durable power of attorney should be applied to the witnessing of the designation and its revocation. Acceptance of the basic principle of self-determination brings sharply into focus the need to have safeguards to assure that the choice of attorney or conservator is that of a capable person. If it is not, it is a sham, a device to transfer control of a person's property to others disregarding the interests of the incapable person, and it is the state's responsibility to protect those persons.

RECOMMENDATION: FAMILY MEMBER'S RIGHT TO BECOME
STATUTORY CONSERVATOR

- 20 (1) FAMILY MEMBERS, IN ORDER OF SPOUSE, ADULT CHILDREN, PARENT, AND SIBLING, SHOULD HAVE PRIORITY NEXT AFTER A PERSON DESIGNATED BY THE PERSON INCAPABLE OF MANAGING, TO REPLACE THE PUBLIC TRUSTEE AS STATUTORY CONSERVATOR, AND FOR CONSIDERATION FOR APPOINTMENT AS CONSERVATOR BY A COURT.
- 20 (2) THE PROCEDURE, WHEREBY A FAMILY MEMBER OF LOWER OR EQUAL PRIORITY TO ANOTHER MAY BECOME STATUTORY

CONSERVATOR OR CONSIDERED FOR COURT APPOINTMENT AS CONSERVATOR, SHOULD BE SIMILAR TO THE PRACTICE FOR OBTAINING LETTERS OF ADMINISTRATION UNDER THE SURROGATE COURTS ACT.

- 20 (3) WHERE THE PUBLIC TRUSTEE IS NOT SATISFIED REGARDING THE APPROPRIATENESS AS STATUTORY CONSERVATOR OF A PERSON APPLYING TO ASSUME THAT FUNCTION, THE PUBLIC TRUSTEE SHOULD BE ABLE TO APPLY TO THE COURT TO HAVE THE COURT DETERMINE THE CONSERVATOR. THE REPLACEMENT OF THE PUBLIC TRUSTEE WOULD NOT TAKE PLACE PENDING THE DETERMINATION BY THE COURT OF THE PROPER CONSERVATOR.
- 20 (4) WHERE A PERSON OTHER THAN THE PUBLIC TRUSTEE IS TO BE STATUTORY CONSERVATOR, THE PROPOSED CONSERVATOR SHOULD BE REQUIRED TO POST A SURETY BOND UNLESS THE COURT ON APPLICATION DIRECTS THAT THERE SHOULD BE NO BOND.
- 20 (5) WHERE A PERSON OTHER THAN THE PUBLIC TRUSTEE IS TO BE STATUTORY CONSERVATOR, A PLAN FOR THE MANAGEMENT OF THE ESTATE SHOULD BE DEVELOPED IN CONJUNCTION WITH THE PUBLIC TRUSTEE AND FILED WITH THE PUBLIC TRUSTEE. THE PLAN OF MANAGEMENT SHOULD NOT LIMIT THE POWER OF THE STATUTORY CONSERVATOR TO DEAL WITH THIRD PARTIES BUT COULD, IF NOT FOLLOWED BY THE CONSERVATOR, RESULT IN A COURT DETERMINING THAT THE CONSERVATOR WAS LIABLE FOR DAMAGES TO THE PERSON INCAPABLE OF MANAGING HIS OR HER OWN PROPERTY. THE PLAN OF MANAGEMENT SHOULD BE CAPABLE OF BEING AMENDED IN CONSULTATION WITH THE PUBLIC TRUSTEE.

20 (6) THE STATUTORY CONSERVATOR WOULD BE REQUIRED TO
PERFORM THE DUTIES RELATED TO THE APPROPRIATE
ADMINISTRATION OF THE ESTATE AND THE DUTIES TO
ACCOUNT WHICH ARE DEALT WITH IN PART VI OF THIS
REPORT.

EXPLANATION

As noted in the background to this Part, there is a feeling among those in the community that when a person has been certified under Part III of the Mental Health Act as incapable of managing his or her property, there should be an inexpensive, expeditious process to have a spouse or other family member replace the Public Trustee as statutory conservator. There are, however, concerns that a family member may not be capable of managing the property in the best interests of the incapable person. The Committee view is that family members should be able to replace the Public Trustee as statutory conservator, but that the Public Trustee should play a vital role in screening potential family members who wish to serve as statutory conservator. The Public Trustee should also have an ongoing supervisory role with respect to statutory conservators.

The right of family members to be conservator must be established by statute. It will also be necessary to set out in the statute the order of priority to serve. Among the family the spouse would have the first priority, adult children second priority, parent third priority, brothers and sisters fourth priority and then priority will be determined among next of kin with those being closest to the incapable person having priority. A spouse should include a common law spouse. A definition may include,

for example, a person of opposite sex involved in a conjugal relationship, living together for a specified period of time.

Where a person who is a family member of high priority for eligibility to serve as statutory conservator does not wish to serve, or where there are persons of equal priority, rules are necessary to establish the right to be statutory conservator. The Surrogate Courts Act provides for such a procedure in the sections dealing with right to serve as administrator of an estate after the death of a person who has not selected anyone to administer their estate. The procedure essentially establishes that those with higher priority can renounce the right to administer and consent to someone of lower priority being the administrator. It would seem that this approach is suitable in the case of management of the incapable person's property. Where the family cannot agree, the Public Trustee would continue to be statutory conservator.

The Public Trustee cannot be given a judicial role in screening, yet the Public Trustee should be able to prevent an inappropriate person from becoming conservator. It is suggested that the statutory mechanism to do this would be to provide for the Public Trustee to initiate a judicial procedure to appoint a conservator. Where the Public Trustee believes that a family member is inappropriate to be conservator, for example, where the family member has a conflict of interest, the Public Trustee could apply to the court for the appointment of another conservator. The court should only be determining the suitability of the family member to be conservator. It should not be determining whether the ward is incapable of managing property, for that has been determined, in these cases, under the Mental Health Act. As a practical

matter, the ability of the Public Trustee to apply to the court for determination would screen out unrealistic applications. It is likely that few persons would persist in seeking to be conservator when they face the contentious application. Of course, the Public Trustee would not apply to the court unless there was a strong likelihood that the court would not appoint the particular family member as conservator. Pending the judicial determination, the Public Trustee would remain statutory conservator.

As at present, under the Mental Incompetency Act, a conservator, or statutory conservator, should be required to post a bond to guarantee the estate will be managed properly. The court on application should be empowered to order that no bond is required.

The statutory conservator would be required to follow the duties set out and discussed under duties of a conservator in Part VI of this Report. With these safeguards, the procedure for a family member to be a statutory conservator in place of the Public Trustee should serve the needs of the community well.

PART IV -- COURT APPOINTMENT OF CONSERVATOR

Some Background

The Mental Incompetency Act, that now provides for court appointment of a committee (pronounced caw'-mitt-ee) of the estate (and the person) of a mentally incompetent person, or the appointment of a committee of the estate of a person found incapable of managing his or her property, is of 19th century origin. Its principal origins are pre-confederation. There have been several glosses on the statute in an attempt to bring it into the 20th century, for example, "mentally incompetent person" has replaced the earlier "lunatic", but there has been no fundamental revision of the Act.

There are approximately 350 applications annually under the Act to the District Courts. Although there is a right to move the application to the Supreme Court, this right is seldom used. Few applications are contested. A contested application is very expensive to the applicant.

All but the contested applications are determined by a judge at a hearing after reading affidavits by medical doctors and others accepted by the court as experts. Contrary to popular belief, compared to other court proceedings, the costs of these proceedings are not astronomical. The total cost of an uncontested application is usually under \$3,000 and often under \$2,000. The two most costly features of the application are the costs of preparing affidavits of the experts and the costs of representation at the hearing.

One community concern is that, under the existing Act, a court may make a declaration of mental incompetency, a

declaration that has a general detrimental affect on the regard in which an individual is held by the community. Although, in most cases, the purpose for obtaining a declaration of mental incompetency is only to protect the estate and to make provision for the person who is unable to manage his or her property, the declaration alters the status of the person so that he or she is legally a mentally incompetent. It is believed that this declaration altering status is unnecessary.

RECOMMENDATION: NO DECLARATION OF INCOMPETENCE

21 THE COURT SHOULD BE AUTHORIZED TO FIND A PERSON INCAPABLE OF MANAGING HIS OR HER PROPERTY AND TO APPOINT A CONSERVATOR. THERE SHOULD BE NO DECLARATION THAT A PERSON IS A MENTALLY INCOMPETENT OR INCAPABLE PERSON.

EXPLANATION

In Part I, the issues related to mental incapacity are discussed. The Committee has recommended that a functional approach to mental incapacity be adopted. Where the issue before the court is incapacity of a nature that prevents the person from functioning to manage his or her property, it is unnecessary to do more than find this as a matter of fact and provide a conservator to manage the property. It is unnecessary to alter the status of the person. The order would have the effect of removing only the right of the person to manage his or her own property. If the person was incapable of making other necessary life choices and in need of a guardian, the

court can be empowered to address those specific incapacities and provide appropriate remedies.

RECOMMENDATION: PRESUMPTION OF CAPACITY/PROOF OF
INCAPACITY

22 (1) THE COMMON LAW PRESUMPTION OF CAPACITY SHOULD BE
RETAINED. IN ANY PROCEEDING BEFORE A COURT, THE
ONUS OF PROVING INCAPACITY SHOULD BE ON THE
PERSON WHO ALLEGES IT.

22 (2) IN COURT PROCEEDINGS, THE STANDARD OF PROOF OF
INCAPACITY TO MANAGE PROPERTY SHOULD BE PROOF
BEYOND REASONABLE DOUBT.

EXPLANATION

No society could exist without at least a presumption in fact that individuals are capable. While the courts have developed different tests of capacity with respect to different types of transactions, e.g. contracts, wills, wrongful acts, the responsibility for proving lack of capacity is always on the person who alleges it. This presumption seems to reflect the need for stability in transactions.

The right to self-determination is fundamental. While in some circumstances it may be necessary to provide a substitute decision-maker for a person who is incapable of managing his or her own property or affairs, it should not be easy to establish incapacity.

The existing Mental Incompetency Act appears to have two different standards of proof. In an application for a declaration of mental incompetency, subsection 7(1) of the Mental Incompetency Act requires proof beyond reasonable doubt that the person is a mentally incompetent person. Under section 39 of the same Act, where the application is to determine that a person is incapable of managing his affairs, that fact must only be proved to the satisfaction of the court, that is, proof on the balance of probabilities. It is the Committee's view that it is inappropriate to have two standards. The Criminal Code standard of proof beyond reasonable doubt is a good safeguard of the fundamental right to self-determination.

RECOMMENDATION: SUMMARY UNCONTESTED PROCEDURE

23 THE COURT PROCESS THAT RESULTS IN A DETERMINATION OF INCAPACITY TO MANAGE PROPERTY SHOULD PROVIDE FOR A COURT ORDER ESTABLISHING MENTAL INCAPACITY TO MANAGE PROPERTY AND THE APPOINTMENT OF A CONSERVATOR, WITHOUT THE NECESSITY OF A HEARING, PROVIDED THAT EACH ELEMENT THAT MUST BE ESTABLISHED BEFORE AN ORDER IS ISSUED IS PROVEN BY EVIDENCE, AND NO PERSON HAS EITHER FILED AN OBJECTION OR REQUESTED A HEARING.

EXPLANATION

A person who may have his or her right to manage property removed should have a right to be heard. However, where notice of a hearing has been given and no one has expressed interest in appearing or opposing, even after objections are sought, it should be possible to proceed without a hearing. However, each element that must be

established before an order is issued would be required to be established by uncontroverted evidence.

A summary judicial process is needed to provide a relatively inexpensive procedure for determining incapacity to manage property that will result in the appointment of a conservator to manage that property. This process must protect the property and civil rights of persons alleged to be incapable of managing.

The absence of an inexpensive method for permitting some responsible person to manage the property of those who are no longer capable of managing and have assets of moderate value, leads to the distorted use of other legal devices. Family members may, with the best of intentions, have powers of attorney signed by persons who are no longer capable of understanding the nature of a power of attorney or appreciating its consequences. Medical certification under the Mental Health Act of incapacity to manage properly is being used when the person certified as incapable of managing has no real connection with a psychiatric facility. If appropriate procedures are not available, members of the community, often with good intentions and often at some legal risk to themselves, will adopt what appears to be the best practical choice. The great danger is that the rights and liberties of individuals will not be adequately protected. Not all persons using legally inappropriate methods to have the capacity of a person to manage his or her own property removed are well intentioned. Therefore, the Committee has developed an approach that is both cost effective and protective, if slightly unorthodox.

RECOMMENDATIONS: ELEMENTS OF SUMMARY JUDICIAL PROCEDURE

- 24 AN ORDER DETERMINING THAT A PERSON IS INCAPABLE OF MANAGING HIS OR HER PROPERTY SHOULD BE ISSUED BY THE COURT, SIGNED BY A JUDGE, WITHOUT HEARING, WHERE THE FOLLOWING EVIDENCE IS FILED WITH THE COURT AND NO OBJECTION OR CONTRARY EVIDENCE IS FILED:
- 24 (1) PROOF THAT NOTICE OF THE COURT PROCESS WAS SERVED ON THE PERSON ALLEGED TO BE INCAPABLE OF MANAGING HIS OR HER PROPERTY, THE PUBLIC TRUSTEE, AND THE TWO FAMILY MEMBERS, OTHER THAN THE APPLICANT, WHO HAVE PRIORITY FOR CONSIDERATION AS CONSERVATOR AND WHO ARE RESIDENT IN ONTARIO;
- 24 (2) THE INCAPACITY TO MANAGE OF THE ALLEGED INCAPABLE PERSON MUST BE ESTABLISHED BY OPINIONS TO THIS EFFECT IN STANDARD FORM DOCUMENTS PROVIDED BY AT LEAST TWO PERSONS WHO KNOW THE ALLEGEDLY INCAPABLE PERSON AND WHO CAN EXPECT NO DIRECT OR INDIRECT PECUNIARY BENEFIT AS A RESULT OF THE APPOINTMENT OF A CONSERVATOR;
- 24 (3) A STANDARD FORM DOCUMENT STATING THAT AN EFFORT WAS MADE TO EXPLAIN THE SIGNIFICANCE OF THE NOTICE OF PROCESS AND THE RIGHT OF THE ALLEGEDLY INCAPABLE PERSON TO OPPOSE THAT PROCESS. THIS DOCUMENT MUST BE SIGNED BY A COMMUNITY WORKER WHO HAS VISITED THE ALLEGEDLY INCAPABLE PERSON.
- 24 (4) WHERE THE PUBLIC TRUSTEE IS TO BE THE CONSERVATOR, THE CONSENT OF THE PUBLIC TRUSTEE;

24 (5) WHERE A PERSON OTHER THAN THE PUBLIC TRUSTEE IS
TO SERVE AS CONSERVATOR, THE PUBLIC TRUSTEE'S
CERTIFICATE THAT:

(a) THE PLAN OF MANAGEMENT OF THE PROPERTY PUT
FORWARD BY THE PROPOSED CONSERVATOR HAS BEEN
EXAMINED BY THE OFFICE AND HAS BEEN FOUND
APPROPRIATE;

(b) THE PROPOSED CONSERVATOR HAS BEEN ASSESSED
BY THE PUBLIC TRUSTEE, INCLUDING WHETHER A
BOND IS AVAILABLE, AND THE PUBLIC TRUSTEE
DOES NOT OBJECT TO THE CONSERVATORSHIP OF
THAT PERSON.

25 (1) THE STANDARD FORM DOCUMENTATION TO BE COMPLETED
ON AN APPLICATION FOR AN ORDER APPOINTING A
CONSERVATOR, THOUGH NOT AN AFFIDAVIT, BE MADE
EVIDENCE TO BE CONSIDERED BY THE COURT AND THE
PERSON SIGNING SHOULD BE SUBJECT TO
CROSS-EXAMINATION ON THE DOCUMENTS AS THOUGH THE
CONTENTS OF THE DOCUMENTS WERE MADE UNDER OATH OR
AFFIRMED. THIS RECOMMENDATION SHOULD BE
ADDRESSED IN THE LEGISLATION.

25 (2) WHERE A JUDGE REVIEWING THE DOCUMENTATION IS NOT
SATISFIED BY THE EVIDENCE, HE OR SHE CAN DIRECT
THAT COUNSEL OR THE PARTIES APPEAR OR THAT ORAL
EVIDENCE BE PRESENTED.

EXPLANATION

The allegedly incapable person and those who are most
closely related to him or her must be served with notice

of process and given the opportunity to oppose or demand a hearing. This opportunity could be used to establish a more appropriate conservator than the person proposed in the application.

It is the Committee's view that if two persons who are well acquainted with the alleged incapable person and who have nothing to gain by the appointment of a conservator, have expressed their observations of behaviour showing that the person is incapable of managing his or her property, in the absence of any objection or evidence to the contrary, they may discharge the burden of proof. The standard form documentation, it is expected, would require the person completing it to understand the legal meaning of incapacity to manage property. A judge will determine the sufficiency of the evidence.

A person alleged to be incapable may be frightened by court proceedings or may be unassertive of his or her rights, without being incapable of managing his or her property. The Committee believes that Recommendation 24(3) is a safeguard against the imposition of a conservator on a person who is simply unassertive. The community worker would visit the alleged incapable person and explain the nature of the process to ensure that the person has the best possible understanding of what is happening. Where the person wants to object to the process, the role of the community worker would be to put the person in contact with those who can provide legal assistance.

Where a person other than the Public Trustee is applying for court appointment as conservator, the Public Trustee should play a similar role in reviewing the suitability of a private applicant for court appointment as conservator,

as the Public Trustee's office plays in the case of a statutory conservator. However, it is the court that must control its own process of appointing conservators.

The effect of Recommendation 24(4) and (5) is to facilitate a court decision on the basis of documentation presented without holding a hearing. To this end, it is contemplated that a first review of an application, i.e. the appropriateness of the applicant, the plan of management, and whether a bond will be available; would be done by the Public Trustee. If the documentation is provided, the court may appoint a conservator without the necessity of holding a hearing in the presence of the parties. If the Public Trustee is not satisfied, a person may still proceed with an application to the court and establish to the satisfaction of the court the appropriateness of the plan of management and the availability of a bond. If required, the bond would be made out in favour of the clerk of the court. However, if circumstances warrant, the court may waive the requirement of a bond.

Recommendation 25(1) deals with the nature of the standard form documents. As noted in the background to this Part, one of the major legal costs arising out of the existing court process under the Mental Incompetency Act is the cost of the preparation of affidavits. If affidavits must be prepared for the individuals who are expressing their observations showing that a person is incapable of managing, major legal costs would be added to the system. Standard form documents can be developed that will obtain the necessary information, convey the seriousness of the document and their potential use to the signers.

The standard documentation would make it possible for a judge to sign the order without a hearing, if all the documentation is appropriately completed and filed with the court and no objection is raised or hearing requested. Where the documentation is not completed properly, or an objection to the proceedings is raised, or a person demands that there be a hearing, a hearing would be required before a judge before an order could be made. Where the judge considering the application was not satisfied about some aspect of the application, the judge could direct that counsel or the parties appear or that oral evidence be presented.

RECOMMENDATION: INTERIM CONSERVATOR IN EMERGENCY

- 26 (1) THERE SHOULD BE PROVISION FOR AN APPLICATION FOR INTERIM CONSERVATORSHIP BY THE PUBLIC TRUSTEE WITH NOTICE ONLY TO THE ALLEGED INCAPABLE PERSON. IN EXTREME EMERGENCIES, THE COURT SHOULD BE PERMITTED TO DISPENSE WITH NOTICE TO THE ALLEGED INCAPABLE PERSON;
- 26 (2) AN INTERIM CONSERVATOR COULD ONLY BE APPOINTED IN EMERGENCY SITUATIONS, SUCH AS MENTAL INCAPACITY TO MANAGE PROPERTY COMBINED WITH A PROPERTY TRANSACTION THAT REQUIRED IMMEDIATE ATTENTION;
- 26 (3) THE INTERIM CONSERVATORSHIP WOULD BE NON-RENEWABLE AND LIMITED IN DURATION TO 90 DAYS, UNLESS EARLIER TERMINATED ON A MOTION BY THE PUBLIC TRUSTEE OR THE INCAPABLE PERSON;
- 26 (4) ON AN INTERIM APPLICATION, THE STANDARD OF PROOF WOULD BE TO SATISFY THE COURT OF THE PERSON'S

MENTAL INCAPACITY TO MANAGE AND THE NEED FOR THE ORDER. PROOF BEYOND REASONABLE DOUBT WOULD NOT BE REQUIRED.

EXPLANATION

There are a few situations where persons become mentally incapacitated and unable to manage their property without warning. Sometimes there are serious matters requiring urgent attention that coincide with the incapacity to manage, for example, imminent foreclosure unless mortgage payments are made. The Committee believes a procedure should be available to cover these emergencies.

The Committee discussed the merits of making this an application without notice to any party. It was felt that, as a rule, notice to the alleged incapable person should be required. The ability of the court to dispense with notice is seen as a facilitating measure in cases of extreme urgency.

Since an emergency is, in fact, the basis for the application, ordinary procedural safeguards must be reduced and replaced with others. Three safeguards on this procedure are: only the Public Trustee can be interim conservator; the order is limited in duration; and the order is non-renewable.

The standard of proof should be to satisfy the judge of the incapacity and that the financial transaction requires urgent attention. It should be noted that the Committee has also recommended provision for court appointment of an interim conservator on motion in an application for a court appointed conservator in connection with an

accounting by an attorney under a durable power (see Recommendation 15).

RECOMMENDATION: NO PARTIAL INCAPACITY TO MANAGE PROPERTY

27 THE COURT SHOULD NOT BE EMPOWERED TO FIND A PERSON PARTIALLY INCAPABLE OF MANAGING PROPERTY WHICH WOULD RESULT IN THE APPOINTMENT OF A CONSERVATOR.

EXPLANATION

The Committee's decision not to provide for partial incapacity to manage property and the appointment of a conservator of that property is contrary to the direction taken by most North American jurisdictions that have recently revised their incapacity legislation. The American Uniform Probate Code, a document prepared by experts in law from across the United States to improve the uniformity of state legislation, recommends recognizing partial incapacity. The American Bar Association publication on Guardianship and Conservatorship, Disabled Persons and the Law, makes a similar recommendation. However, jurisdictions that have adopted a partial incapacity to manage property approach have had significant increases in the number of persons found incapable of managing. A device -- partial incapacity -- intended to fine-tune the law has resulted, in the view of the Committee, in far too many persons losing their right to control their property. Partial incapacity appears to be an open invitation for family members to attempt to wrest control of property away from affluent elderly.

The Committee is of the view that a conservator should be appointed where, and only where, a person is proven beyond reasonable doubt to be unable to manage a substantial part of his or her property. The Committee has recommended in Part VI of this Report that the conservator should have a positive duty to assist an incapable person towards self-management of his or her estate. This would involve, in appropriate cases, the conservator providing discretionary sums for the incapable person to learn or relearn to make choices with respect to their property. It would also result, when the incapable person was beginning to appreciate the nature and consequence of acts, in decisions being made jointly by conservator and ward.

RECOMMENDATION: TERMINATION OF CONSERVATORSHIP

28 (1) A PROCEDURE SHOULD BE ESTABLISHED WHEREBY A COURT ORDER APPOINTING A CONSERVATOR COULD BE TERMINATED WITHOUT THE REQUIREMENT OF A HEARING BEFORE A JUDGE.

28 (2) THE COURT ORDER SHOULD BE TERMINATED WITHOUT A HEARING WHERE AN APPLICATION TO TERMINATE IS BROUGHT BY THE PERSON HAVING A CONSERVATOR, THE PERSONAL GUARDIAN OF THAT PERSON IF THERE IS ONE, THE CONSERVATOR, OR THE PUBLIC TRUSTEE AND THE FOLLOWING EVIDENCE WAS SUBMITTED WITH NO OBJECTIONS BEING RAISED OR HEARING REQUESTED:

(a) PROOF THAT NOTICE WAS GIVEN TO THE CONSERVATOR AND TO THE PERSONS WHO WERE ENTITLED TO THE NOTICE OF APPLICATION FOR THE APPOINTMENT OF A CONSERVATOR;

(b) THE APPLICATION TO TERMINATE WAS SUPPORTED BY THE CERTIFIED OPINION, IN STANDARD FORM DOCUMENTATION, OF TWO PERSONS WHO WERE WELL ACQUAINTED WITH THE PERSON HAVING A CONSERVATOR, AND WHO HAVE NO EXPECTATION THAT THEY WILL RECEIVE A DIRECT OR INDIRECT PECUNIARY BENEFIT IF THE CONSERVATORSHIP IS TERMINATED. THE OPINIONS MUST BE TO THE EFFECT THAT THE PERSON IS NOW CAPABLE OF MANAGING ALL, OR MOST, OF HIS OR HER PROPERTY;

(c) A STANDARD FORM CERTIFICATE IS FILED AS EVIDENCE THAT A COMMUNITY WORKER WHOSE FUNCTION IS TO ASSIST PERSONS TO COPE IN THE COMMUNITY HAS VISITED THE PERSON AND EXPLAINED THE EFFECTS OF THE TERMINATION OF THE ORDER.

28 (3) WHERE OBJECTIONS TO THE TERMINATION ARE RAISED, THE MATTER WOULD GO TO A HEARING BEFORE A JUDGE. WHERE NO OBJECTIONS ARE RAISED, THE ORDER COULD BE SIGNED BY A JUDGE. THE JUDGE WOULD HAVE THE RIGHT TO DIRECT THE APPEARANCE OF COUNSEL, THE PARTIES OR THE GIVING OF ORAL TESTIMONY.

28 (4) UNLESS THE PERSON WITH A CONSERVATOR IS OBJECTING TO THE TERMINATION OF THE ORDER, THE ONUS OF PROVING INCAPACITY TO MANAGE PROPERTY BEYOND REASONABLE DOUBT WILL FALL ON THE PERSON MAKING THE OBJECTION. WHERE THE PERSON WHO OBJECTED TO THE TERMINATION OF THE CONSERVATORSHIP IS THE PERSON HAVING A CONSERVATOR, THAT PERSON WOULD NEED TO PROVE ONLY THAT THERE WAS STILL A NEED FOR A CONSERVATOR.

EXPLANATION

It should be as simple to terminate an order appointing a conservator as it is to create one. Therefore, a hearing should not be required where application is made for termination and the application is unopposed.

The process outlined in this recommendation is analogous to the process for appointing the conservator without a hearing. However, the class of persons who may apply for termination of the order appointing a conservator is limited compared to those who may apply to have a conservator appointed. The whole community has an interest in preventing exploitation of a person who does not have a conservator and who is, in fact, incapable of managing his or her property. Few people have a legitimate interest in interfering with a situation where a person is protected. The person who believes that capacity should be restored has a vital interest. So too, does a personal guardian or a conservator who believes that the ward can function effectively in managing the property. All others should be required to funnel their concerns through the Public Trustee.

Notice of an application to terminate an order appointing a conservator must be given to those affected. The evidence of two persons, who are well acquainted with the person having a conservator and can establish that they do not have any expectation of pecuniary benefit from the termination of the conservatorship, should be sufficient. The requirement of a visit to the person from a community worker is desirable to avoid termination of the order being effected to permit access to the person's assets in order to avoid an accounting by a conservator, and to informally assist the person to assume responsible control

of his or her property. The application for termination appears to be a good triggering mechanism to ensure that assistance in coping in the community with the management of property is available where necessary.

Where the person previously found incapable wishes to oppose the termination of the order, the community worker would assist in the process of having counsel retained.

Where opposition to termination is filed, the matter would be heard by a judge of the court. Since evidence of capacity would be before the court, the onus of establishing incapacity beyond reasonable doubt should shift once again to those alleging incapacity. One exception to this rule should be where the person found incapable has filed in opposition. In these circumstances, the termination application would be suspect and the court should hear the evidence and act on the balance of probabilities.

Where no objections are made to an order terminating the appointment of a conservator, a judge would be able to sign the order. Where the judge was not satisfied with the documentary evidence, the judge could direct the appearance of counsel, the parties or the presentation of oral testimony.

RECOMMENDATION: MORE ACTIVE ROLE FOR PUBLIC TRUSTEE

- 29 (1) THE PUBLIC TRUSTEE SHOULD PERFORM A MORE ACTIVE
ROLE IN APPLYING TO THE COURT FOR APPOINTMENT OF
A CONSERVATOR ON BEHALF OF PERSONS HAVING
PROPERTY WHO HAVE BECOME INCAPABLE OF MANAGING
IT, WHETHER THOSE PERSONS ARE IN THE COMMUNITY OR

ARE IN INSTITUTIONS;

29 (2) WHERE A PERSON BELIEVED TO BE INCAPABLE OF
MANAGING HIS OR HER OWN PROPERTY IS IN AN
INSTITUTION, INVESTIGATION BY THE PUBLIC TRUSTEE
SHOULD BE INITIATED BY THE SUPERVISORY STAFF OF
THE INSTITUTION OR THE FAMILY.

29 (3) WHERE A PERSON IS LIVING IN THE COMMUNITY AND THE
PUBLIC TRUSTEE HAS REASONABLE AND PROBABLE
GROUNDS TO BELIEVE THAT THE PERSON IS INCAPABLE
OF MANAGING HIS OR HER OWN PROPERTY, THE PUBLIC
TRUSTEE SHOULD BE EXPRESSLY AUTHORIZED TO
INVESTIGATE AND SEEK OUT AN APPROPRIATE PERSON.
WHERE THERE IS NO APPROPRIATE PERSON OR THIS
PERSON REFUSES TO ACT, THE PUBLIC TRUSTEE SHOULD
HAVE THE POWER TO APPLY TO THE COURT FOR THE
APPOINTMENT OF A CONSERVATOR.

EXPLANATION

There appear to be some persons, both in the community and in residential facilities, who have property that they are incapable of managing and who do not have anyone willing to initiate proceedings to obtain the appointment of a conservator of the estate. The Public Trustee should take a more active role. Since the management of property would be the matter of concern in these cases, it would appear that the cost of an application would often be recovered from the estate in question by the Public Trustee. Once an application is made, there may be an appropriate family member who is capable and willing to be conservator of the estate.

PART V -- POWERS AND AUTHORITY OF STATUTORY
AND COURT-APPOINTED CONSERVATOR

Some Background

Three totally different statutory approaches exist with regard to conferring powers and authority on those authorized to manage the property of a person incapable of managing. The three applicable statutes are the Mental Health Act, the Mental Incompetency Act and the Powers of Attorney Act. Where a person is medically certified as incapable of managing his or her property under Part III of the Mental Health Act, the Public Trustee becomes committee of the estate. The Public Trustee's powers in that case are full and absolute. As provided in section 46 of the Mental Health Act:

"The Public Trustee as committee of a patient or out-patient has and may exercise all the rights and powers with regard to the estate of the patient or out-patient, that the patient or out-patient would have if of full age and sound and disposing mind."

Contrasted with this is the power and authority of a committee appointed under either section 7 or section 39 of the Mental Incompetency Act. In that situation, the committee has only the specified powers and authority conferred by the court in the order. There is some doubt whether the court can confer full power and authority even on the Public Trustee as committee under the Mental Incompetency Act. For example, it would appear that in making investments, the court-appointed committee is now limited to those set out in the legal list of investments in sections 26 and 27 of the Trustee Act. No similar limitation is imposed on the Public Trustee under Part III

of the Mental Health Act. Indeed, it has become common in drafting private trust documents for a settler of property to provide that the trustees may make investments other than those in sections 26 and 27 of the Trustee Act. The restrictions of those sections can, in inflationary periods, create problems for a committee of the estate of an incapable person attempting to maintain the income of the estate to provide for an incapable person and his or her dependants.

Whatever historical rationale may have existed for the approach taken in the Mental Incompetency Act, that approach no longer fits with the authority of an attorney under a durable power of attorney, as provided by the Powers of Attorney Act. As discussed in Part II of this Report, a person can create a durable power of attorney that confers on the attorney full and absolute power to deal with his or her property when the person becomes incapable. While it is true that a durable power can be limited in the powers the donor confers, few limited durable powers are being created or are likely to be created. The result is that there are almost no controls placed on an attorney acting under a durable power and almost total control over a committee appointed by the court. This disparity does not appear justifiable on the basis that a durable power of attorney is an act of self-determination by a capable person.

It would be reasonable to bring the powers and authority conferred by court appointments more into line with the approach taken in the Mental Health Act and Powers of Attorney Act. This is particularly true if the Committee's recommendations in Part III of this Report are adopted, for they would allow a family member to assume the function of manager or conservator of property from

the Public Trustee where there is medical certification of incapacity to manage under Part III of the Mental Health Act.

Undoubtedly, there are some risks in adopting this approach. As a practical matter, the added risks with respect to court-appointed conservators are not significant. There are many more estates of incapable persons administered under the Mental Health Act and there will be many more administered under durable powers of attorney than will be administered under court appointments. In addition, the risks with respect to all forms of administration of the estates of incapable persons would be reduced by the Committee's recommendation regarding the imposition of specific duties on the attorney under a durable power, statutory conservator and court-appointed conservator. These matters are dealt with in Part VI of this Report.

RECOMMENDATION: POWERS OF CONSERVATOR

30 (1) SUBJECT TO THE LIMITATIONS IMPOSED BY A COURT, A STATUTORY OR COURT-APPOINTED CONSERVATOR SHOULD HAVE POWERS SIMILAR TO THOSE NOW CONFERRED ON THE PUBLIC TRUSTEE UNDER PART III OF THE MENTAL HEALTH ACT, THAT IS, THE CONSERVATOR SHALL HAVE, AND MAY EXERCISE, ALL THE AUTHORITY AND POWERS WITH REGARD TO THE ESTATE OF THE PERSON INCAPABLE OF MANAGING THAT THAT PERSON WOULD HAVE, IF OF FULL AGE, OF SOUND MIND, AND NOT UNDER A DISABILITY, EXCEPT THE POWER TO MAKE A WILL.

30 (2) A STATUTORY OR COURT-APPOINTED CONSERVATOR SHOULD NOT BE RESTRICTED TO INVESTMENTS SET OUT IN A

LEGAL LIST, BUT THE STATUTE SHOULD SET OUT CONSIDERATIONS TO BE KEPT IN MIND BY THE CONSERVATOR WHEN MAKING INVESTMENTS.

30 (3) WHETHER THE CONSERVATOR RECEIVES HIS OR HER POWER AND AUTHORITY TO ACT FROM THE STATUTE OR IS APPOINTED CONSERVATOR BY THE COURT, THE COURT SHOULD BE GIVEN THE POWER TO LIMIT THE POWERS AND AUTHORITY OF THE CONSERVATOR ON APPLICATION, AT ANY TIME DURING THE CONSERVATORSHIP, AND ALSO, THE COURT SHOULD BE GIVEN THE POWER TO REMOVE ANY LIMITATION IT HAS IMPOSED.

30 (4) ANY LIMITATION OF THE POWERS AND AUTHORITY OF A CONSERVATOR SHOULD:

(a) BE SET OUT IN A CERTIFICATE ISSUED BY THE PUBLIC TRUSTEE IN THE CASE OF A STATUTORY CONSERVATOR, OR

(b) BE SET OUT IN THE ORDER OF THE COURT IN THE CASE OF A COURT-APPOINTED CONSERVATOR.

THE CERTIFICATE WOULD BE PROOF IN THE ABSENCE OF EVIDENCE TO THE CONTRARY THAT THE PERSON NAMED AS STATUTORY CONSERVATOR HAD ALL RIGHTS AND POWERS, EXCEPT THOSE EXPRESSLY LIMITED IN THE DOCUMENT.

30 (5) THE PLAN OF MANAGEMENT THAT A STATUTORY OR COURT-APPOINTED CONSERVATOR WOULD BE REQUIRED TO PREPARE WOULD ESTABLISH THE APPROACH TO MANAGEMENT OF THE ESTATE THAT WOULD BE TAKEN BY THE CONSERVATOR, BUT IT WOULD NOT LIMIT THE RIGHTS AND POWERS OF THE CONSERVATOR. THIRD

PARTIES ACTING IN GOOD FAITH WITHOUT ACTUAL KNOWLEDGE OF THE DETAILS OF THE PLAN OF MANAGEMENT SHOULD BE FULLY PROTECTED FROM ANY WRONGDOING BY THE CONSERVATOR. THE STATUTORY OR COURT-APPOINTED CONSERVATOR COULD BE HELD LIABLE BY A COURT FOR DAMAGES TO THE ESTATE THAT RESULTED FROM A DEPARTURE FROM THE PLAN OF MANAGEMENT.

EXPLANATION

The Committee is of the view that the conservator, whether statutory or court appointed, should have plenary power, unless those powers are limited by a court. In terms of the liability of the conservator to the estate of the person who is incapable of managing, a departure from the plan of management that results in a loss to the estate could result in a court finding the conservator liable to the estate. The duties of the conservator, discussed in Part VI of this Report, will include: a general duty of prudent care; a duty to take and file an inventory of assets; a duty of financial reporting; a duty to avoid conflicts of interest; a duty to distribute income and assets in accordance with the plan set out in the statute; and a duty to account.

It appears inconsistent with both the general authority to manage that most attorneys under a durable power exercise and the general management approach under the Mental Health Act now conferred on the Public Trustee, to take a more restrictive approach.

To make the scope of the powers clear, it would appear desirable to provide in the statute, without limiting the

generality of the authority and powers of a conservator, as provided in Recommendation 30(1), the authority and powers include the following:

- (a) deposit money belonging to the estate in a chartered bank, trust company or any other depository empowered by law to accept monies for deposit;
- (b) sell any property of the estate by public auction or private contract for cash or credit on appropriate security;
- (c) dispose of any property of the estate by way of exchange for other property; or where the property of the estate consists of an undivided share, concur in the partition of the property in which the share is held;
- (d) as lessee, renew a lease held by the estate;
- (e) as lessor, grant or renew a lease or sublease of the property of the estate, and grant an option to renew the lease or to sublease or to purchase the reversion.
- (f) manage, maintain, repair, renovate, improve or develop property of the estate; including, in the case of land, subdividing, erecting buildings, dedicating for any public purpose, granting easements, profits à prendre or licences, and entering into agreements with respect to boundaries, property walls, fencing or other matters in connection with property of the estate;

- (g) ensure against loss or damage to property of the estate and against any other risk or liabilities;
- (h) carry on any business, whether as sole proprietor, partner, limited partner or otherwise, incorporate or otherwise change the form of the business, and dispose of or wind up the business;
- (i) exercise all rights and powers and satisfy all liabilities incidental to the ownership of shares or obligations of a corporation, including power to sell or exercise subscription rights, to exchange the shares or obligations for other shares or obligations, to join in plans for reconstruction, reorganization or amalgamation, to enter into pooling or other agreements, or to authorize the sale of the assets or undertakings of the corporation;
- (j) surrender insurance policies, leases, or other property subject to onerous obligations;
- (k) purchase or rent a living accommodation or construct a house for the purpose of providing a home for the incapable person or his or her legal dependants in performing the duties imposed by the distributive obligations of the conservator;
- (l) borrow money and, as security, mortgage, pledge or otherwise charge any of the property of the estate;
- (m) pay or assert or contest any claim, and compromise, compound, abandon, submit to

arbitration or otherwise settle any debt,
account, claim or thing relating to the estate;

- (n) give a receipt in writing for any money or other property received;
- (o) pay out of the estate any taxes, assessments, charges, premiums or other outgoing monies in respect of the estate;
- (p) reimburse the conservator or pay or discharge out of property of the estate all expenses incurred in or about the administration of the estate;
- (q) appropriate property of the estate in specie in or towards satisfaction of the duty of the conservator to support the incapable person and his or her legal dependants, and for such purpose, following consultation with a qualified person where the conservator is not personally qualified, place a valuation on the property so appropriated;
- (r) make a gift permitted by the dispositional provisions set out in Part VI of this Report;
- (s) do all supplementary or ancillary acts or things and execute all instruments necessary or desirable to enable the conservator to carry out effectively the duties imposed on him or her.

Presently, when making investments, court-appointed conservators are required to adhere to a list of very conservative investments set out in sections 26 and 27 of the Trustee Act. The Public Trustee, as statutory

committee under Part III of the Mental Health Act, is not so constrained.

In its 1984 Report on the Law of Trusts, the Ontario Law Reform Commission, after a complete examination of the benefits and detriments of a legal list of authorized investments for trusts, rejects the legal-list approach in favour of more flexible statutory considerations and a duty of care for trustees (see pages 187-227 and pages 304-305).

The Committee favours this approach for conservators. It also adopts the considerations suggested for investments with the proviso that conservators are not obliged to consider each of the matters mentioned before deciding upon any investment. The Committee would, therefore, like to see statutory guidelines stating that among the matters appropriate for a conservator to consider when making investments are:

- (a) the marketability of the investment;
- (b) the length of the term of the investment, including its maturity date, callability and redeemability;
- (c) the probable duration of the conservatorship;
- (d) the probable condition of the market with respect to the value of the investment at the termination of the conservatorship, especially if at the termination of the conservatorship investment must be converted into money for the purpose of distribution;

- (e) the probable condition of the market with respect to reinvestment at the time when the investment matures;
- (f) the aggregate value of the estate and the nature of the other investments;
- (g) the effect of the investment in increasing and diminishing liability for taxes; and
- (h) the effect of inflation.

The Committee would add that the conservator should consider the appropriate diversification of investment. Recommendation 30(3) is intended as a mechanism for dealing with concerns about possible mismanagement of the estate. The court, on application, where it finds some aspect of the management of the estate to be inappropriate, should be able to limit the powers and authority of the conservator. It should also be able, where appropriate, to remove any limitation previously made by the court of the powers and authority of the conservator.

The Committee has decided that the conservator should not be a trustee, even though the relationship between the conservator and the person incapable of managing is a fiduciary relationship calling for the utmost good faith on the part of the conservator. This decision is discussed in Part VI of this Report, which deals with the duties of the conservator. As a result of the Committee's recommendation it becomes necessary to provide documentary evidence for those dealing with a conservator that will assure those persons that the transactions are protected. The limitation on the powers and authority of the

conservator imposed by a court should be clearly documented in a certificate provided to a private statutory conservator by the Public Trustee; and, in the case of a court-appointed conservator, in a court order appointing him or her. It should not be necessary for a purchaser or person dealing with a conservator to look behind these documents.

Consistent with the approach of protecting third persons dealing with the conservator, the plan of management prepared by a conservator which sets out the approach that he or she will be taking to the management of the estate of the incapable person, should not be a limitation of the powers and authority of the conservator. Instead, the plan, if breached, could result in a court holding the conservator liable to the estate of the incapable person for any loss resulting from the breach. In this context, it should be noted that conservators will be required to be bonded, unless a court orders otherwise, so there is a guarantee to the estate that the conservator will fulfill his or her obligations. Where the Public Trustee or a trust company is the conservator, the bonding will not be required.

RECOMMENDATION: EMPLOYMENT OF AGENTS

31 WHERE IT IS REASONABLE AND PRUDENT IN THE CIRCUMSTANCES TO DO SO, CONSERVATORS MAY EMPLOY ONE OR MORE PERSONS AS AGENTS WITHIN OR OUTSIDE ONTARIO TO CARRY OUT ANY ACT REQUIRED TO BE DONE IN THE ADMINISTRATION OF THE ESTATE, INCLUDING THE EXECUTION OF DOCUMENTS, THE PAYMENT, TRANSFER, AND RECEIPT OF MONEY FOR OTHER PROPERTY, AND THE GIVING OF DISCHARGES FOR RECEIPTS, BUT EXCLUDING THE EXERCISE OF THE

DISCRETION IN DISTRIBUTION OF THE ESTATE OR INCOME OF THE ESTATE, WHICH IS DISCUSSED IN PART VI OF THIS REPORT.

EXPLANATION

There are two rules of law that cause doubt about the extent to which a conservator can now employ agents: first, that a person who is a delegate cannot further delegate to another; and second, that a fiduciary must perform his or her tasks personally. In practice, the courts appear to have modified the application of these rules to permit a committee of the estate to function in a complex world.

The Committee is of the opinion that the general approach taken by the Ontario Law Reform Commission in its Report on the Law of Trusts (1984) to delegation by trustees of duties and powers is appropriate, with minor modification, for conservators (see pages 42-54).

Where it is reasonable and prudent to do so, a conservator should be permitted to use agents to carry out the administrative functions. For example, where a business of renting properties is involved, a property manager could be retained. However, the Committee feels that with respect to decisions about distributions, as provided for in Part VI of this Report, it is the conservator who must personally make the decisions. While the conservator may obtain information from others in arriving at those distributive decisions, the discretionary powers should be his or hers alone.

RECOMMENDATION: INVALIDATING CONTRACTS

32 (1) WHERE A PERSON WHO HAS A CONSERVATOR HAS ENTERED A CONTRACT DURING THE CONSERVATORSHIP OR IN THE SIX MONTHS PRIOR TO THE CONSERVATORSHIP, OR DURING SUCH LONGER PERIOD PRIOR TO THE CONSERVATORSHIP AS A COURT, ON MOTION IN THE ACTION DETERMINES IS FAIR, THE CONSERVATOR SHOULD HAVE A RIGHT OF ACTION AGAINST THE OTHER PARTIES TO THE CONTRACT TO AVOID THE CONTRACT. A CONTRACT SHOULD BE VOIDED BY THE COURT UNLESS THE PARTY DESIRING TO SUSTAIN IT CAN SATISFY THE COURT THAT FULL AND VALUABLE CONSIDERATION WAS ACTUALLY PAID OR SECURED.

32 (2) WHERE A PERSON WHO HAS A CONSERVATOR HAS GIVEN A GIFT OR OTHER BENEFIT TO ANYONE DURING THE CONSERVATORSHIP OR IN THE SIX MONTHS PRIOR TO THE CONSERVATORSHIP, OR DURING SUCH LONGER PERIOD PRIOR TO THE CONSERVATORSHIP AS A COURT, ON MOTION IN THE ACTION DETERMINES IS FAIR, THE CONSERVATOR SHOULD HAVE A RIGHT OF ACTION AGAINST THE BENEFICIARY OF THE GIFT. THE GIFT SHOULD BE VOIDED BY THE COURT UNLESS THE PERSON DESIRING TO SUSTAIN IT CAN SATISFY THE COURT THAT THE PERSON GIVING THE GIFT WAS CAPABLE OF MANAGING HIS OR HER PROPERTY AT THE TIME OF THE GIFT.

EXPLANATION

Common law and judge-made law provide that in order to create a valid contract, each party must have the capacity to contract. Mental incapacity is one of the conditions that can interfere with this capacity. Where a person has

been declared by a court to be a mental incompetent or a person incapable of managing his or her property, the person cannot dispose of any property since this would interfere with the court's control of that property.

Where a person has not been declared to be mentally incompetent or incapable of managing his or her property by the court, the opinion most commonly expressed is that the person is bound by any contract unless two things can be proven, namely the fact of mental incapacity at the time of the transaction and the other party's knowledge of this fact. It is equally clear that the onus proof of both these facts lies with the person wishing to avoid the contract. Therefore, even a contract entered into by a person who is mentally incapable under circumstances where the other party to the transaction knew of the incapacity, is not void, but merely voidable, and it can be set aside by the court.

One statutory provision that alters the common law with respect to the contracts or gifts by an incapable person is section 52 of the Mental Health Act. A similar provision is contained in section 26 of the Developmental Services Act. Section 52 provides:

"Where the Public Trustee is committee of the estate of a patient or out-patient, every gift, grant, alienation, conveyance or transfer that is not made for full and valuable consideration actually paid or secured or that is made at or after the time when the purchaser or transferee had notice of the mental condition of the patient or out-patient, of the fact that he was a patient or out-patient or of the committee ship shall be deemed to be fraudulent and void as against the Public Trustee."

It should be noted that this only applies when the Public Trustee is managing the estate of an incapable person. It does not apply when a private person is managing the estate of an incapable person under the Mental Incompetency Act. The meaning of this provision is quite unclear. A question arises as to whether this provision applies to transactions that have taken place prior to the Public Trustee becoming committee or if it applies only after the Public Trustee has become committee. The wording of the provision pertaining to notice seems to reinforce the idea that the Public Trustee must be committee at the time a gift or contract is entered.

Unfortunately, it is a common problem that persons who have in fact become incapable of managing their property are prone to make highly improvident agreements and gifts. They may enter contracts without any real benefit to themselves. They may give away their houses. It has been noted throughout this Report that capable persons who actually choose to engage in this type of behaviour should not be prohibited from doing so by the laws governing mental incapacity. However, where a person does not understand the nature and consequences of his or her acts, and, therefore, cannot in any real sense be choosing an action, it is of concern to the community. The common law rule for setting aside a contract makes it almost impossible for a conservator to have a contract voided by the court. The conservator must prove not only that the person was mentally incapable at the time the contract was made, but also that the other party knew of this incapacity. The evidentiary facts surrounding the situation are, at that time, solely in the possession of the other party.

The Committee's recommendations are not without their

problems. By permitting a conservator a right of action to avoid a contract or gift made prior to the creation of the conservatorship, the recommendation retroactively interferes with the presumption of capacity. Furthermore, unlike the common law rule, this rule favours one party to a contract, the person incapable of managing his or her property, over another party to the contract and also over third parties. While there are other options for dealing with this situation all have this effect. The Committee believes that persons who are incapable should be protected from exploitation.

The recommendation by the Committee with respect to gifts puts a heavier onus on the beneficiary of the gift. The beneficiary must satisfy a court that the person who made the gift was not incapable at the time the gift was made. On the whole, the Committee believes that this recommendation is fair in these circumstances because it will discourage persons from taking property from those of doubtful capacity. Person receiving valuable gifts in such circumstances should take care to obtain evidence of the capacity of the giver.

In practice, the Committee believes that these provisions, if enacted, would permit a conservator, on behalf of the person who is incapable of managing his or her property, to recover property, including money, that the person effectively gave away at a time when he or she was incapable.

PART VI -- DUTIES OF CONSERVATORS AND
DUTIES OF ATTORNEYS UNDER DURABLE POWERS

Some Background

At present, the Public Trustee is the sole statutory committee in Ontario. Where a person is certified by a doctor under Part III of the Mental Health Act as incapable of managing his or her property, it is the Public Trustee that assumes the management of the person's estate. The Committee's major recommendations regarding statutory conservators are set out in Part III of this Report. In this management capacity, the Public Trustee's actions are governed by provisions in the Mental Health Act. The Public Trustee has a general duty to pass accounts and in the event that a committee is appointed under the Mental Incompetency Act, the Public Trustee is under a duty to account for and transfer to the committee so appointed the estate of the patient or out-patient that has come into his hands.

Section 57 of the Mental Health Act provides the sole direction with respect to the standard of administration which is required from the Public Trustee. The section provides that the Public Trustee shall pay the proper charges for maintenance of the person and may also pay such sums as he considers advisable to the patient's family or other persons dependent on him, and the payments for maintenance of the family and other dependants may be made notwithstanding that such payments may prevent the payment of maintenance that otherwise would have been due from the patient or out-patient.

The Mental Incompetency Act provides for the appointment of any person to be committee of the estate of an

incompetent person or a person found to be incapable of managing his or her property. The appointment is on application to the District Court of Ontario or to the Supreme Court. The committee must file with the court a scheme of management setting out a plan for the administration of the estate, i.e., meeting mortgage payments, paying routine bills, receiving dividends from stocks, etc. In terms of the course of conduct, the court has power to make a broad range of orders. Depending on the circumstances and practice of the judge hearing the application, the court can confer broad or narrow powers on the committee.

Control of the committee's action is exerted by the requirement that a scheme of management be filed with the court. A court-appointed committee has only the powers that the court confers and must return to court from time to time to receive approval for a proposed change in management of estate. A committee appointed under the Mental Incompetency Act has a positive duty to pass accounts, to keep a true inventory of the estate, and must also give security for the performance of his or her duties.

While the duties of a court-appointed committee are set out in the Mental Incompetency Act, there is no clear statement of the objectives of the management of the estate. In short, the existing Act provides a mechanism for management of estates of incapable persons without a definite idea of purpose.

Private individuals and the Public Trustee find themselves as committees or custodians of estates without any clear legislative direction. This can result in a conflict between the expectations of dependants of the incapable

person and other family members, and the Public Trustee or private committee attempting to properly perform his or her duties. There appears to be a great need for criteria to govern the management, and more importantly, the distribution of funds from the estate of an incapable person.

RECOMMENDATION: DUTIES AND OBJECTIVES IN STATUTE

33 A COURT-APPOINTED CONSERVATOR AND A STATUTORY CONSERVATOR SHOULD NOT BE A TRUSTEE, WITHIN THE MEANING OF THE TRUSTEE ACT. THE DUTIES OF A CONSERVATOR AND STATUTORY DIRECTION REGARDING THE OBJECTIVES FOR THE EXERCISE OF THE CONSERVATOR'S POWERS SHOULD BE SET OUT IN THE SUBSTITUTE DECISIONS AUTHORITY ACT.

EXPLANATION

The law applicable to trustees is both statutory, i.e. the Trustee Act, and judge-made. While parts of that law are relevant to conservators, much is not. It was the Committee's view that many conservators administering modest estates would not have access, on an ongoing basis, to legal counsel to advise them on trust law. It would be more appropriate to set out all the duties of the conservator in the statute. In this way, persons who are thinking of applying to become conservator can appreciate the nature of the obligations they may be undertaking.

The statute should provide conservators with the objectives of their management. It is most difficult for any manager to perform his or her functions without

knowing what objectives to seek.

RECOMMENDATION: DUTY AND STANDARD OF CARE

- 34 (1) A NON-PROFESSIONAL CONSERVATOR OR ATTORNEY UNDER A DURABLE POWER SHOULD BE LIABLE TO THE ESTATE OF THE INCAPABLE PERSON WHERE THE CONSERVATOR OR ATTORNEY FAILS TO EXERCISE THE DEGREE OF CARE, DILIGENCE AND SKILL THAT AN ORDINARY, PRUDENT PERSON IN BUSINESS WOULD EXERCISE IN CONDUCTING THAT BUSINESS.
- 34 (2) PROFESSIONAL CONSERVATORS AND ATTORNEYS, INCLUDING THE PUBLIC TRUSTEE AND A TRUST COMPANY, WHO, IN FACT POSSESS, OR WHO BECAUSE OF THEIR PROFESSION, BUSINESS, OR CALLING OUGHT TO POSSESS A PARTICULAR LEVEL OF KNOWLEDGE OR SKILL WHICH IN ALL THE CIRCUMSTANCES IS RELEVANT TO THE ADMINISTRATION OF THE ESTATE, SHOULD BE LIABLE TO THE ESTATE OF THE INCAPABLE PERSON WHERE THEY FAIL TO EMPLOY THAT PARTICULAR LEVEL OF SKILL IN THE ADMINISTRATION OF THE ESTATE.
- 34 (3) THE COURT SHOULD BE AUTHORIZED TO RELIEVE A CONSERVATOR OR ATTORNEY FROM LIABILITY WHERE THE CONSERVATOR MIGHT TECHNICALLY BE LIABLE. WHERE THE CONSERVATOR OR ATTORNEY HAS ACTED HONESTLY, REASONABLY, AND DILIGENTLY THE COURT SHOULD HAVE THE AUTHORITY TO RELIEVE THE CONSERVATOR OR ATTORNEY, EITHER WHOLLY OR PARTLY, FROM PERSONAL LIABILITY.

EXPLANATION

The Committee is of the opinion that a conservator, while not formally a trustee, should be required to exhibit two of the primary duties of a trustee: to act in good faith; and, in the performance of the requirements of the office, to act with diligence, prudence and sagacity. In Part II of this Report, the Committee recommended that these duties should also apply to an attorney under a durable power who is unable to obtain directives from the donor of the power. The duty of good faith of a conservator and an attorney is developed in Recommendation 35 related to conflicts of interest.

What standard of care, diligence and skill should be required of a conservator or an attorney under a durable power? In dealing with trusts, the courts have rejected a subjective standard of care for trustees. They have adopted an objective standard to be applied to every person who becomes a trustee. It does not matter that a person who assumes the management of an estate of another as trustee is unskilled or neglectful of his own affairs. When that person is acting as trustee for another, the person must exhibit the same diligence and care that an ordinary prudent man of business would exercise in conducting a business of his own. If the person fails to live up to that standard and loss results to the trust, the trustee will be personally liable. In applying an objective standard, the abilities of the person whose conduct is being examined are not considered. A good short discussion of the duty of care for trustees is contained in the Ontario Law Reform Commission Report on the Law of Trusts (1984), at pages 24-35.

Should a conservator or attorney, often a family member,

be required to live up to the same standard of care? The Committee is of the view that the traditional standard imposed by the courts provides a clear picture to persons who assume the responsibility that they must perform their duties in a hard-headed, business-like fashion. They have the option of not undertaking the responsibility in which case the Public Trustee will perform the function of conservator. An attorney who is not able to live up to the obligation should refuse the appointment. In addition to its clarity, this standard has the benefit of being well known to the courts.

Professional conservators, including the Public Trustee and trust companies, should be required to live up to a higher standard of care: the standard that those in their profession, business, or calling ought to possess.

It was the Committee's view that there might be situations in which an individual acting as conservator or attorney under a durable power, particularly a family member, might have failed to exercise "that degree of care, diligence and skill that an ordinary, prudent person in business would exercise in conducting that business" and yet still have acted honestly, reasonably and diligently. In these circumstances, the court should be empowered to relieve the conservator or attorney, either wholly or partly, from personal liability.

RECOMMENDATION: DUTY REGARDING CONFLICTS OF INTEREST

35 THE LEGISLATION SHOULD PROVIDE THAT CONSERVATORS AND ATTORNEYS UNDER DURABLE POWERS SHALL DISCHARGE THEIR DUTIES AND EXERCISE THEIR POWERS IN GOOD FAITH AND SOLELY IN THE INTERESTS OF THE PERSON INCAPABLE OF

MANAGING. WITHOUT LIMITING THE GENERALITY OF THIS DUTY, CONSERVATORS AND ATTORNEYS UNDER DURABLE POWERS SHALL NOT KNOWINGLY PERMIT THEMSELVES TO BE IN A POSITION IN WHICH THEIR INTEREST CONFLICTS IN ANY WAY WITH THE DISCHARGE OF THEIR DUTIES AND THE EXERCISE OF THEIR POWERS. THEY ALSO SHALL NOT KNOWINGLY PERMIT THEMSELVES TO BE IN A POSITION IN WHICH THEY MAY DERIVE ANY BENEFIT FOR THEMSELVES OR FOR ANY OTHER PERSON, EXCEPT INSOFAR AS THE DISTRIBUTIVE DUTIES OF A CONSERVATOR OR AN ATTORNEY REQUIRE THEM TO PROVIDE SUPPORT TO THEMSELVES AND TO OTHERS AND SO FAR AS THE COURT MAY PERMIT ON APPLICATION.

EXPLANATION

A person in a fiduciary relationship to another owes that person the obligation of not acting in a way that is a conflict of interest. Honesty and integrity is central to the relationship. This duty of care, adopted from the recommendation contained at page 82 of the Ontario Law Reform Commission Report on the Law of Trusts (1984), is discussed at pages 62 to 69 of the OLRC Report.

One problem that will constantly arise with private conservators and attorneys under durable powers who are unable to obtain directions from the donor is that, as family members, they could reasonably expect to benefit if the person whose estate they are managing had not become incapable. Indeed, the distributive duties established for conservators and attorneys discussed in this part require that legal dependants of the person incapable of managing be supported, if possible, at the standard at which they are accustomed to living. This recommendation attempts to take this potential conflict into account.

However, it is in the area of the more discretionary exercise of the conservator's powers and authority that the most serious conflicts of interest can arise. It is a discretion of the conservator to give gifts. Further, it is the conservator's discretion to make loans. Where these discretionary powers are to be exercised, this provision should result in the discretionary powers not being exercised in favour of the conservator, unless the conservator has applied to the court and received the court's approval.

RECOMMENDATION: DUTIES AND DIRECTIONS REGARDING
EXPENDITURES AND DISTRIBUTIONS

36 (1) THE CONSERVATOR OR THE ATTORNEY ACTING UNDER A DURABLE POWER OF ATTORNEY WHO IS UNABLE TO OBTAIN DIRECTIONS FROM THE DONOR SHOULD BE UNDER A DUTY TO EXPEND OR DISTRIBUTE AMOUNTS REASONABLY NECESSARY FOR THE SUPPORT, EDUCATION, CARE OR BENEFIT OF:

(a) THE INCAPABLE PERSON, AND

(b) THE LEGAL DEPENDANTS OF THE INCAPABLE PERSON.

36 (2) WHERE THE ESTATE IS AMPLE TO FULFILL, AND CONTINUE TO FULFILL, THE OBLIGATIONS TO PROVIDE FOR THE INCAPABLE PERSON AND HIS OR HER LEGAL DEPENDANTS, AS REQUIRED BY 36(1), THE CONSERVATOR OR ATTORNEY UNDER A DURABLE POWER HAS DISCRETION TO EXERCISE THE POWERS:

(a) TO EXPEND OR DISTRIBUTE AMOUNTS, MAKE LOANS AND OTHERWISE ASSIST MEMBERS OF THE

INCAPABLE PERSON'S FAMILY AND OTHER PERSONS ABOUT WHOSE WELFARE THE INCAPABLE PERSON HAS SHOWN CONCERN;

(b) TO MAKE GIFTS TO CHARITY AND OTHER OBJECTS IN WHICH THE INCAPABLE PERSON HAS SHOWN INTEREST IN SUPPORTING, IN AMOUNTS THAT DO NOT EXCEED IN TOTAL FOR ANY YEAR, 20% OF THE INCOME OF THE ESTATE.

36 (3) IN DETERMINING THE AMOUNTS OF EXPENDITURES OR DISTRIBUTIONS, CONSIDERATIONS GUIDING THE CONSERVATOR OR ATTORNEY SHOULD BE THE FOLLOWING WHICH ARE SET OUT IN DESCENDING ORDER OF IMPORTANCE:

(a) THE PROBABLE DURATION OF THE INCAPACITY AND THE LIKELIHOOD THAT THE INCAPABLE PERSON, AT SOME FUTURE TIME, MAY BE CAPABLE OF MANAGING HIS OR HER OWN PROPERTY;

(b) THE SIZE OF THE ESTATE;

(c) THE ACCUSTOMED STANDARD OF LIVING OF THE INCAPABLE PERSON AND HIS OR HER LEGAL DEPENDANTS;

(d) THE INTENTIONS, IF ANY, OF THE INCAPABLE PERSON EXPRESSED BEFORE THE INCAPACITY AROSE;

(e) THE OPINIONS, IF ANY, EXPRESSED BY THE INCAPABLE PERSON, SO THAT INSOFAR AS IT IS POSSIBLE TO DO SO, EXPENDITURES AND DISTRIBUTIONS WILL BE MADE AS THE PERSON WOULD HAVE MADE THEM HAD THE INCAPACITY NOT

OCCURRED. WHERE IT IS NOT POSSIBLE TO DETERMINE WHAT THE PERSON WOULD HAVE DONE IF HE OR SHE HAD REMAINED CAPABLE, THOSE EXPENDITURES AND DISTRIBUTIONS MAY BE MADE IN THE BEST INTERESTS OF THE INCAPABLE PERSON OR HIS OR HER LEGAL DEPENDANTS;

(f) OTHER FUNDS OR SOURCES USED FOR THE SUPPORT OF THE INCAPABLE PERSON.

(g) IN ADDITION TO THE FOREGOING, IN THE CASE WHERE A DISTRIBUTION, LOAN OR OTHER ASSISTANCE IS TO BE MADE TO A PERSON WHO IS NOT A DEPENDANT, WHETHER A MEMBER OF THE INCAPABLE PERSONS FAMILY OR A PERSON NOT RELATED, THE OPINION OF THE INCAPABLE PERSONS FAMILY.

36 (4) THE DUTIES AND CONSIDERATIONS REGARDING EXPENDITURES AND DISTRIBUTIONS SHOULD BE THE SAME WHETHER THE PUBLIC TRUSTEE, A FAMILY MEMBER OR OTHER PERSON IS CONSERVATOR OR ATTORNEY UNDER A DURABLE POWER.

36 (5) THERE SHOULD BE PROVISION FOR APPLICATION TO THE COURT FOR DIRECTIONS BY A CONSERVATOR, ATTORNEY UNDER A DURABLE POWER AND A LEGAL DEPENDANT OF AN INCAPABLE PERSON. THE COURT SHOULD HAVE THE AUTHORITY TO DIRECT ANY EXPENDITURE OR DISTRIBUTION THAT IT IS SATISFIED IS IN THE BEST INTEREST OF THE INCAPABLE PERSON OR HIS OR HER LEGAL DEPENDANTS.

EXPLANATION

The Committee's intention with respect to these recommendations is to achieve a balance between the need to avoid placing the conservator or attorney acting under a durable power who is unable to obtain directions from the donor, in a position of not being able to fulfill the legal obligations of the incapable person, and the desire to have the conservator deal with the property of an incapable person in the same manner as the person would have had they not lost the capacity to manage their property.

The conservator or attorney under a durable power should be obliged to fulfill the legal obligations of the incapable person both for his or her own welfare and to those who are his or her legal dependants. In this connection, the conservator or attorney under a durable power cannot be placed in a legally impossible position. Those who are providing support, education, care or benefit to the incapable person and the legal dependants of the incapable person have enforceable rights to payment or support.

Where the incapable person, when capable, was extremely frugal, the conservator or attorney will in expending money or distributing amounts continue a frugal approach but will be required to expend to a more objective level of what is "reasonably necessary".

Where the assets of the estate are sufficient to provide, and to continue in future to provide, all that is reasonably necessary to the incapable person and those legally dependant on him or her, the Committee believes that there should be a discretion given to the conservator

or attorney acting under a durable power to assist the incapable person's family and those other persons with whom the incapable person had a close relationship and about whose welfare he or she had concerns. The power to make gifts to charity and other objects is a total departure from the existing law governing court-appointed conservatorship.

The discretion to assist relatives and others, and the discretion to make gifts in a limited amount, are attempts to give recognition to the concept that a conservator or attorney under a durable power should deal with the property in the same manner as the person would have done had he or she not lost the capacity to manage property. Safeguards limit such actions to situations where the assets of the estate are sufficient to provide, and continue to provide, adequate maintenance for the incapable person and the incapable person's dependants. While the limitation on gift giving to a total of 20% of the annual income of the estate is somewhat arbitrary, the Committee felt it to be a prudent limitation.

The Committee believes it desirable to have set out in legislation, for the guidance of conservators and attorneys acting under durable powers, a set of considerations to be borne in mind together with their relevant importance. The most important consideration is the likelihood of the incapable person becoming capable and resuming management of his or her own property. If the likelihood is high, more conservative decisions should be made. The incapable person should not find that his or her total estate has been dissipated upon regaining capacity to manage.

The second consideration, the size of the estate, will have a significant bearing on the actions of the conservator or attorney acting under a durable power.

In most cases, the accustomed standard of living of the incapable person and his or her legal dependants will be a material expression of the intentions of the incapable person while he or she was capable. In some cases, it will not be. For example, where the estate is vast and the family's standard of living, before incapacity, was low, the conservator, considering the size of the estate and his or her legal duties to provide everything that is "reasonably necessary" will increase the standard of living.

The conservator or attorney acting under a durable power is directed to consider the intentions, if any, of the incapable person expressed before the incapacity arose. It may be that the incapable person intended to increase the standard of living of the family. It may be that he or she was intending to make a loan to a family member or to a friend. Where it is reasonable to do so, those intentions should be respected. In dealing with this discretionary power, opinions of family members should be considered in an effort to avoid disagreement. However, while consultation is necessary, approval from the family is not.

With respect to discretionary expenditures, it is the Committee's view that the conservator should "stand in the shoes of" the incapable person. The conservator or attorney acting under a durable power should seek out the opinions, if any, of the incapable person. While the incapable person does not have the capacity to manage his or her property, he or she will often have opinions about

distributions and expenditures that should guide the conservator or attorney. The objective with respect to discretionary expenditures and distribution is to do what the person would have done if he or she had remained capable. Where, as would occur in many cases, changing circumstances make it impossible to determine what the person would have done if capable, the direction is to make those expenditures and distributions in the best interests of the incapable person and his or her legal dependants.

The Committee considered and rejected as a secondary test "the best interests of the incapable person". A narrow interpretation of the best interests of the incapable person would result in a direction merely to enlarge the estate as much as possible. Undoubtedly, this would have led to considerable conflict between the conservator or attorney acting under a durable power unable to obtain instructions from the donor, and the legal dependants of a person incapable of managing. To avoid the narrow interpretation of the best interests of the incapable person, the Committee has recommended, as a secondary test, the best interests of the incapable person or his or her legal dependants.

As far as possible, the standard of administration with respect to distribution and expenditures from the estate should be the same whether the Public Trustee or family member is conservator. If the Public Trustee was given broader discretionary powers than a family member, dependants of the incapable person would be discouraged from seeking to be statutory conservator. While the Public Trustee has exercised the broad discretionary powers under the existing Mental Health Act with considerable sensitivity to the needs of the incapable

person and his or her family, where there is a family member able and willing to perform the function of statutory conservator or court-appointed conservator, he or she should not be discouraged from doing so.

Some situations may arise where the conservator or attorney acting under a durable power is unable to obtain directions from the donor and cannot decide whether a course of action is in the best interests of the incapable person or his or her legal dependants. It is likely that these situations will arise where there is strong differences of opinions among the family of the person incapable of managing. There should be provision for application to the court for directions by a conservator, attorney under a durable power and a legal dependant of a person incapable of managing and the court should have the authority to direct any expenditure or distribution that it is satisfied is in the best interests of the incapable person or his or her legal dependants.

RECOMMENDATION: DUTY TO PERFORM IN ACCORDANCE WITH PLAN
OF MANAGEMENT

37 THE CONSERVATOR, OTHER THAN THE PUBLIC TRUSTEE,
WHETHER COURT APPOINTED OR STATUTORY, SHOULD BE UNDER
AN OBLIGATION TO PERFORM HIS OR HER DUTIES IN
ACCORDANCE WITH A PLAN OF MANAGEMENT.

EXPLANATION

In its explanation to Recommendation 30 in Part V of this Report, the Committee has discussed the purpose of a plan of management in assuring that conservators manage the

estates of persons incapable of managing with prudence. The plan of management would operate as an undertaking given by the conservator to the estate. Whether the conservator was appointed by the court or was a statutory conservator, he or she would be required to present the plan of management to the Public Trustee. Where the proposed conservator was applying to the court, and the Public Trustee did not have any objections to the proposed plan of management, the Public Trustee would file an acceptance with the court. The plan of management would be part of the documentation reviewed by the judge in considering the application for the appointment of a conservator. Where the Public Trustee did not file acceptance of the plan of management, the issues related to the plan of management would be decided by the judge determining the application. Where the judge found the plan of management inadequate, restrictions on the powers of the conservator could be set out in the court's order. Where there were no objections to the plan of management, there would likely be no restrictions on the order appointing a conservator. It is contemplated that a plan of management could be amended where a proposal to amend was submitted to the Public Trustee and the Public Trustee accepted the amendment and other persons who were entitled to notice did not object. An objection would give rise to a hearing before a judge.

It is contemplated that the plan of management will play a similar role for private statutory conservators. Where a person applies to take over the function of statutory conservator from the Public Trustee, he or she will be required to file a proposed plan of management with the Public Trustee. Where the Public Trustee is satisfied that the person is appropriate, the plan of management is acceptable, and there is a bond in place, the Public

Trustee will turn administration over to the private statutory conservator.

Where the Public Trustee has doubt about any aspect of the suitability of the applicant for statutory conservator, the Public Trustee will apply to the court for directions. In the course of giving directions and considering the application, the court will be able to limit the powers of the private statutory conservator. Amendments to the plan of management would be made by giving notice to appropriate persons. Where those persons and the Public Trustee agreed with a proposed change in the plan of management, the plan could be changed. If objections were made, the Public Trustee could apply to the court for directions.

Where a conservator breaches the plan of management, and that breach results in loss to the estate, the conservator could be found to be liable to the estate by a court.

RECOMMENDATION: ACCOUNTABILITY OF CONSERVATORS

- 38 (1) A CONSERVATOR SHOULD BE REQUIRED TO PROVIDE ANNUAL NOTICE TO CERTAIN PERSONS THAT, ON REQUEST, A FINANCIAL STATEMENT REGARDING THE MANAGEMENT OF THE PROPERTY WOULD BE GIVEN TO THEM.
- 38 (2) A FINANCIAL STATEMENT PROVIDED ON REQUEST SHOULD BE SENT:
- (a) TO THE INCAPABLE PERSON AND TO THE PERSONAL GUARDIAN, IF THERE IS ONE, OF THE INCAPABLE PERSON;

(b) IF THE PUBLIC TRUSTEE IS COURT-APPOINTED CONSERVATOR OR STATUTORY CONSERVATOR, THE PERSON RESIDENT IN ONTARIO WITH HIGHEST PRIORITY ENTITLED TO BECOME COURT-APPOINTED CONSERVATOR OR STATUTORY CONSERVATOR;

(c) IF A PERSON OTHER THAN THE PUBLIC TRUSTEE IS COURT-APPOINTED OR STATUTORY CONSERVATOR, TO THE PUBLIC TRUSTEE.

38 (3) PERSONS WHO HAVE REQUESTED A FINANCIAL STATEMENT SHOULD HAVE THE RIGHT TO REQUEST FURTHER PARTICULARS.

38 (4) THE PERSONS ENTITLED TO RECEIVE THE NOTICE OF AVAILABILITY OF A FINANCIAL STATEMENT SHOULD BE ENTITLED TO APPLY TO THE COURT TO CAUSE A PASSING OF ACCOUNTS BY THE CONSERVATOR.

38 (5) ON THE WINDING UP OF A CONSERVATORSHIP, THERE SHOULD BE A DUTY ON THE CONSERVATOR TO PASS ACCOUNTS BEFORE THE COURT (SEE RECOMMENDATION 41).

EXPLANATION

There is a need for a conservator, whether court-appointed or statutory, to provide at least a minimum amount of financial accounting to those who have a legitimate interest in the administration of the estate of the incapable person. In Part II of this Report, the Committee recommended that an attorney under a durable power should be required to provide similar accounting when the donor of the power has been medically certified

under the Mental Health Act as incapable of managing his or her property.

While there is need for financial accountability, there is also a community concern that a financial statement falling into the wrong hands may have undesirable consequences for a person incapable of managing his or her own property. Covetousness of family and strangers is not unknown. Ill-motivated actions can have serious, detrimental effects on the care and well being of an incapable person. There is a strong tendency among those who have no true affection for a person capable of managing to want to treat that person's estate as though the incapable person is dead. To meet the need for accountability, yet avoid statements falling into the wrong hands, the requirement is that the conservator, whether statutory or court appointed, in the first instance, send out only a notice that a financial statement will be made available to the appropriate person on request. This will avoid the statement being open for examination, for example, in a residential care facility.

Regulations should provide the format and contents of the financial statement that will be provided on request. The financial statement should provide relevant information to assist in determining whether the estate is being properly managed, yet should be in a format that will not result in great expense being incurred in formulating it. The format will be similar to a financial statement provided by trust company with respect to the management of an estate.

In many cases, an incapable person would, if capable, refuse to give financial information to anyone. In other cases, persons who become incapable would, if capable,

fully disclose financial information. People vary enormously with respect to their desire for privacy. As noted earlier, financial data that is openly available to inquisitive persons poses a potential risk to the person incapable of managing his or her own property. The decision that remains is to whom a notice should be given indicating that a financial statement will be provided on request.

The persons with the greatest interest, of course, are the person incapable of managing property and a personal guardian, if there is one. Decisions such as where to live depend, in large measure, on financial resources.

While consideration was given to providing the notice of availability of a financial statement to the legal dependants of the incapable person, it was concluded that the legal dependants who are not being supported in a reasonable manner would be able to obtain financial information in an application to the court under the Family Law Reform Act. Unless they are being inadequately supported, the legal dependants have no legitimate interest in knowing the details of the estate of the incapable person.

Where the Public Trustee is statutory conservator or court-appointed conservator, a family member will be entitled to apply to the court or to apply to the Public Trustee to replace the Public Trustee as conservator (see Part III of this Report). Therefore, that person should be entitled to receive the financial statement, so that he or she can decide whether to replace the Public Trustee. Similarly, the Public Trustee will be entitled to apply to the court to replace a family member who is a

court-appointed or statutory conservator and, therefore, should be able to obtain a financial statement.

As noted earlier, the financial statement will be a relatively simple document. It may not provide sufficient information on which to make detailed decisions. However, in most cases, the persons entitled to this information will have no interest in receiving further financial information. Where they desire further financial information, they should be able to obtain it. The ability to obtain further financial information is an intervening step between the requirement on the conservator to provide a passing of accounts and the minimum requirement of the financial statement. This intermediate step will permit the conservator to satisfy the inquiry and thus avoid the costs and time involved in a passing of accounts.

The passing of accounts before a court is a complex and expensive procedure. It is not a process to be indulged in lightly. Nevertheless, when a less formal means of the financial statement and the provision of further information are ignored or are insufficiently complied with or lead to a questioning of the administration of the estate of an incapable person, a passing of accounts may be required.

RECOMMENDATION: DUTY TO WORK TOWARDS SELF-MANAGEMENT

39 THE CONSERVATOR SHOULD HAVE A DUTY TO ASSIST THE INCAPABLE PERSON TOWARDS SELF-MANAGEMENT OF HIS OR HER ESTATE.

EXPLANATION

Having a conservator to manage your estate is a situation in which self-reliance is held to a minimum. The law should strive to habilitate the incapable person towards self-management. While the Committee recognizes that in many cases this may not be possible due to the nature of the condition, it is felt that some duty to assist the incapable person should exist. The conservator should be obliged to use reasonable means to seek out persons and/or organizations in the community that may be of assistance in getting the incapable person to take increasing charge of his or her affairs and to function in society as a whole. It may be that in this function of assisting the person who is incapable of managing to find the community agencies that offer help, a conservator can play an important role.

RECOMMENDATION: RELATIONSHIP WITH PERSONAL GUARDIAN

40 (1) THE LEGISLATION SHOULD PROVIDE FOR THE RELATIONSHIP BETWEEN THE CONSERVATOR OF THE ESTATE AND THE PERSONAL GUARDIAN, IF THERE IS ONE, AND REQUIRE THE PAYMENT FROM THE ESTATE OF APPROPRIATE AMOUNTS FOR THE INCAPABLE PERSON BY HIS OR HER PERSONAL GUARDIAN.

40 (2) WHERE A PERSON HAS A PERSONAL GUARDIAN AND THERE IS NOT MORE MONEY THAN IS NECESSARY TO PROVIDE FOR THE SUPPORT OF THE INCAPABLE PERSON, THE LEGISLATION SHOULD AUTHORIZE SPENDING BY THE PERSONAL GUARDIAN FOR THE BENEFIT OF THE INCAPABLE PERSON.

EXPLANATION

Where there is a conservator of an incapable person's estate and the person also has a personal guardian, the relationship between the conservator and the personal guardian must be established.

There is no point in having a conservator of the estate where there is only sufficient assets to support the incapable person. In these cases, the personal guardian should be able to deal with day-to-day expenses.

It is impossible for the Committee to determine the relationship in the absence of decisions with respect to personal guardianship. Similarly those given a mandate to develop legislation with respect to a personal guardian should review the recommendations of the Committee contained in this Report to ensure that the law governing the various aspects of substitute decisions for incapable persons is mutually compatible and provides a consistent and comprehensible approach.

PART VII -- ACCOUNTING AND COMPENSATION FOR CONSERVATORS
AND PAID ATTORNEYS UNDER DURABLE POWERS

Some Background: Form of Accounts

Currently, the passing of accounts and the form of the accounts are provided for by a combined reading of the Mental Incompetency Act, the Mental Health Act, individual committeeship orders, and the Surrogate Court Rules (O. Reg 143/78).

Under the Mental Incompetency Act (sections 12 and 13), the District Court of Ontario judge who appoints the committee fixes a time for the initial passing of the accounts of the committee, and on the occasion of that passing, may set either the time for the next passing or subsequent maximum intervals within which passing of accounts must be made. These passing of accounts are before the District Court of Ontario.

Section 54 of the Mental Health Act provides the basis for the Public Trustee to pass his accounts. Such passing and the form of accounts "is to be in like manner as a trustee". This effectively means that Rules 59 to 63 of the Surrogate Court Rules apply and the passing is before the Surrogate Court.

Rule 61 of the Surrogate Courts Act requires;

- (1) Statement of original assets
- (2) Statement of disbursements
- (3) Statement of receipts
- (4) Statement of assets on hand
- (5) Statement of compensation claimed

In addition, an investment statement is required showing (a) all money invested, (b) all money received by way of repayments or realizations upon such investments, and (c) the balance of all such investments on hand.

The statement of disbursements and receipts in (2) and (3) above must be divided into capital and revenue where the will or trust instrument deal with the two separately, which is the vast majority of cases and also the case with committees.

Much of the reason for the complexity of the Surrogate Court requirements is the fee structure and also the fact that usually there are conflicting interests in the estate or trust (i.e. income vs. capital interests). These conflicting interests are not present in the case of a committee. The usual rule-of-thumb for fees provides separate fees for each of revenue receipts, revenue disbursements, capital receipts, and capital disbursements. Therefore, the accounts must separate these out so that the various fees can be calculated, claimed and verified.

In addition, there is a timing requirement. For instance, the fee on capital receipts cannot be claimed until an original asset has been either turned into cash or reinvested. Thus the necessity of the statement showing original assets as opposed to investment. It is the Committee's view that a passing of accounts for a committee or attorney can be simplified.

RECOMMENDATION: FORM OF ACCOUNTS

ATTORNEY'S ACCOUNTS SHOULD BE AS FOLLOWS:

- (a) STATEMENT OF ASSETS AT BEGINNING OF PERIOD
- (b) STATEMENT OF ASSETS AT END OF PERIOD
- (c) STATEMENT OF CAPITAL TRANSACTIONS
- (d) STATEMENT OF REVENUE TRANSACTIONS
- (e) STATEMENT OF COMPENSATION CLAIMED

41 (2) THE ESSENTIAL ELEMENTS SHOULD BE THE SAME WHETHER THEY ARE SUBMITTED TO THE PUBLIC TRUSTEE OR TO THE DISTRICT COURT OF ONTARIO.

41 (3) THE LEGISLATION SHOULD PROVIDE FOR A SUGGESTED FORM OF ACCOUNTS IN A SCHEDULE OR IN REGULATIONS, BUT THE USE OF THIS FORM SHOULD NOT BE MADE MANDATORY, SO THAT STATEMENTS WHICH CONFORM TO THE ESSENTIALS REQUIRED ARE ACCEPTABLE.

EXPLANATION

The Committee feels that the accounts of a conservator should carry out three objectives:

- 1) simple and understandable to the layperson;
- 2) allow the reader to determine and follow the assets and the management of the capital;
- 3) reflect whether or not the incompetent person is being maintained within his or her means (i.e. income), or whether capital is being depleted.

In order for objectives 2 and 3 to be carried out some distinction between capital and revenue should be

retained. The suggested components in Recommendation 41(1) will meet the need for detailing of financial information without requiring too complex a framework.

Standardization of the requirements regarding statement of accounts, whether it is submitted to the Public Trustee or to the District Court of Ontario, simplifies matters for all concerned. With use, it will become obvious which criteria are considered the most important on review and the direction the court takes will be instructional to both the Public Trustee and to private conservators.

Making the contents of the financial statement mandatory without requiring a specific form be used is advantageous. The conservator is facilitated in the use of whatever format he or she or the accountant is familiar with, but with guidelines provided by the schedule as to what the minimum components of the statement must be.

Some Background: Compensation

Current practice of courts is to award compensation to committees on the same basis as they do to trustees. Both section 55 of the Mental Health Act and section 29 of the Developmental Services Act provide a clear statutory entitlement to compensation for the Public Trustee in performing his role as committee. The wording of the sections indicate that compensation be allowed "in an amount not exceeding the amount that a trustee would be allowed for like services". While no statutory authority exists for remuneration of private committees, it is well established practice to compensate them on a similar basis.

Previous caselaw in Ontario indicates that there existed a clearer distinction between compensation levels of the Public Trustee and a private trustee. In Re R., [1950] O.W.N. 549 (H.Ct.) Gale, J recognizes the Public Trustee's right to a fair and reasonable allowance. At p. 550 he asserts:

the amount of compensation to be allowed to a committee of a mentally incompetent person or of a person incapable of managing his affairs depends on all the circumstances surrounding each matter, with particular reference to the value of the assets controlled by the committee, the difficulties encountered, and the skill displayed in the course of administration. It is a mistake to think, however, that normally a committee is to be remunerated to the same extent as a trustee. Very different responsibilities attach to those two offices. Usually a trustee is required to assume much higher responsibilities than a committee. The assets are vested in the former and, with some exceptions, he is generally called upon to exercise his own discretion and judgment in the performance of his duties. On the other hand, the assets of the incapable or incompetent are not vested in a committee, who is perhaps best described as a statutory agent. He exercises very little, if any, dependent discretion. In all important matters he should act only after obtaining the direction of the Court. For these reasons, therefore, it will be seen that in most cases the remuneration of a committee should not match that of a trustee performing similar duties.

While the wording of the decision appears unequivocal, its application is limited in a fundamental respect. Re R. distinguishes the responsibilities of a committee appointed under the Mental Incompetency Act who manages an estate pursuant to a scheme propounded by the court and the responsibilities of a trustee. Where a scheme is

propounded under the Mental Incompetency Act, the court itself takes the responsibility for the decision-making process in the administration of estates and investment of funds, with the result that the committee does have less responsibility than a trustee.

Where the Public Trustee is appointed under the Mental Health Act, he is authorized to do anything that the patient could have done if of full age and of sound and disposing mind. Similarly, in almost every case where the Public Trustee is appointed under the Mental Incompetency Act, no scheme is propounded and the Public Trustee is authorized to do anything that he could have done under the Mental Health Act. The result is that the Public Trustee acting as committee does exercise powers very similar to those of a trustee, and the reasoning in Re R. is not really applicable.

In the recent case of Re Pearce 17 (1984) E.T.R. 124 (B.C.C.A.) it was held that while the provisions of that province's Trustees Act are not to be used as a guideline for the fixing of a committee's remuneration, nevertheless, the court recognized that the same factors will often be relevant.

The courts have worked out a standard of compensation, which at the present time is:

- (a) 2-1/2% on all income received by the estate;
- (b) 2-1/2% on all capital in or out of the estate; and
- (c) a management fee of 2/5ths of 1% per year of the average value of the estate.

There is some concern regarding the capital fee allowance. For example, if a patient who owns real property is certified under the Mental Health Act, he may be released in a week, a year, or perhaps never. If it becomes necessary to sell his property, it is perfectly reasonable to allow the committee 2-1/2% on the capital value realized on the sale of the property and on the disbursement of that capital later to the patient or to the estate. On the other hand, if no action is taken with respect to the real property other than holding the deeds, or if the spouse of the patient is allowed to remain even though the property is registered in the patient's name and eventually the property itself is turned back to the patient or the estate, the 2-1/2% in and out of the capital value is not equitable.

RECOMMENDATION: ENTITLEMENT TO COMPENSATION

42 THERE SHOULD BE A STATUTORY ENTITLEMENT TO
COMPENSATION IN FAVOR OF THE CONSERVATOR.

EXPLANATION

At present, committees do not have a clear statutory right to be compensated and this right should be clearly set out legally.

RECOMMENDATION: FORMAT OF FEE SCALE

43 A SIMPLIFIED FEE SCALE SHOULD BE ESTABLISHED BY
REGULATION SETTING OUT AS A NORMAL FEE A PERCENTAGE

CHARGE ON REVENUE AND A PERCENTAGE CHARGE ON CAPITAL
VALUE.

EXPLANATION

The Committee feels this would be a more appropriate approach than the present fees which reflect the nature of trusts and estates, rather than the nature of conservatorships. The proposed fee scale division would better reflect the work done by the conservator in collecting and disbursing funds, as well as the overall management and investment function. In addition, it would avoid getting into the complexities of the Surrogate Court requirements. The suggested guidelines set by regulation would be annually: 6% of revenue; 3/5 of 1% of the average annual capital value; a 1% one-time set up fee at the end of the first year; and a 1% one-time close out fee on the closeout of the conservatorship.

The nature of the percentage charges reflects Recommendation 41 and the accompanying explanation. Simplification is achieved by dropping separate fees for revenue receipts and disbursements and capital receipts and disbursements, and adopting one simple revenue fee for collecting and disbursing same, and one simple capital fee for managing, investing and disbursing same.

The revenue fee of 6% is to be calculated only on income received by the estate. The set up and close out fees are one time recognition of the inventorying, gathering in, and developing a scheme of management regarding the incapable person's assets. The close out fee is recognition of the fact that the recipient whether the now-recovered incapable person, or his or her personal

representative, or a replacement conservator have the benefit of receiving the assets in an organized, inventoried form, and the effort and expense possibly involved in handling or transferring the assets over.

Obviously, where the transfer is to a successor, conservator, or personal representatives, the transfer should not then be able to charge a "set up" fee because that work has been reflected in the previous conservator's close out fee.

RECOMMENDATION: ADJUSTING FEES

44 DISCRETION SHOULD BE GIVEN TO THE COURT TO ADJUST THE COMPENSATION CLAIMED BY BOTH THE PUBLIC TRUSTEE AND PRIVATE SECTOR CONSERVATORS ON THE BASIS OF QUANTUM MERUIT.

EXPLANATION

The above fee structure should be recognized as a normal fee for an account of average complexity. Flexibility to adjust fees should exist to reflect the particular size, activity, and complexity during any particular accounting period. This flexibility to adjust should exist as time goes on when the normal fee may go out of date or become inappropriate.

RECOMMENDATION: TIMING OF COMPENSATION

45 THE CONSERVATOR SHOULD BE ABLE TO TAKE HIS NORMAL FEES IN MONTHLY INSTALMENTS OR QUARTERLY INSTALMENTS.

EXPLANATION

The Committee feels that a conservator should be able to take compensation on a business-like basis. The recommendation recognizes a basic business premise that the work should be paid for as it is done. The Ontario Law Reform Commission addressed this subject as it applied to trustees in their recent Report on the Law of Trusts (1984), at pages 258 to 261 of the text, and page 517 to 518 (section 72) of the Draft Bill. The Commission recommends "Trustees should be entitled to general compensation on a regular basis during the administration of the trusts, ... they should be entitled to take sums periodically from the trust fund as compensation, without the approval of the court."

The Commission continues:

"We therefore recommend that, in the absence of a contrary intent contained in the trust instrument and subject to several specific controls that we shall propose, the revised Trustee Act should provide that trustees may, from time to time during the administration of the trust, pay to themselves or any of them from the assets of the trust such sum as in their opinion is fair and reasonable compensation for their work and time spent on the trust during the period of time to which the payment relates." (See page 260)

It is the Committee's view that in most cases, compensation should be taken on a current basis. This is especially true with respect to compensation on income because:

- (a) the deduction of compensation is a charge for income tax purposes; and

- (b) current deduction of compensation provides a much more realistic balance for investment purposes or care provisions.

There may be a valid reason why the compensation on capital or set-up fee should not be taken until the end of the administration. For example, a patient could have a \$200,000.00 house but a very limited income after becoming ill. If the conservator was entitled to take a 1% set-up fee on the capital value of the real property, this sum of \$2,000.00 might very well prejudice the payment of maintenance on behalf of the patient.

Compensation should be allowed on a monthly or quarterly basis up to the percentage provided in the regulations. If the conservator feels these amounts are inadequate, a procedure exists to increase the amount of compensation. (See Recommendation 46)

RECOMMENDATION: APPROVAL AND SETTLING OF COMPENSATION

- 46 (1) THE PUBLIC TRUSTEE AND PRIVATE CONSERVATOR SHOULD BE OBLIGED TO GIVE NOTICE ANNUALLY OF THE SUM TAKEN AS COMPENSATION AND AN ACCOUNT OF SERVICES RENDERED TO THOSE PERSONS WHO WE HAVE IDENTIFIED SHOULD RECEIVE NOTICE OF THE AVAILABILITY OF A FINANCIAL STATEMENT. (See Recommendation 38)
- 46 (2) SUCH PERSONS SHOULD BE ABLE TO CHALLENGE THE AMOUNT OF COMPENSATION OR THE FACT THAT IT IS BEING TAKEN ON AN INTERIM BASIS AND SHOULD BE ABLE TO REQUIRE THAT ACCOUNTS BE PASSED AND THAT COMPENSATION BE REVIEWED BY THE COURT.

- 46 (3) IF THE PUBLIC TRUSTEE OR PRIVATE CONSERVATOR FEELS THAT THE NORMAL FEES ARE NOT ADEQUATE COMPENSATION FOR THE WORK DONE, THEY MUST OBTAIN THE CONSENT OF PERSONS WHO THEY ARE UNDER A DUTY TO PROVIDE NOTICE TO REGARDING THE AVAILABILITY OF A FINANCIAL STATEMENT WITH THE EXCEPTION OF THE INCAPABLE PERSON.

EXPLANATION

The approval and settling of a conservator's compensation should be as simple and as inexpensive as possible. At the same time, the Committee feels that certain controls should exist with respect to this procedure. Suggested controls have been adopted from the OLRC Report. The Commission's recommendations are summarized below:

Firstly, the trustees should be obliged to inform the beneficiaries at the time they take the compensation of the sum taken and should provide them with an account of the services rendered for such compensation. If the beneficiaries object then they could compel the trustees to pass accounts and this would put the question of compensation and timing of its taking before the Court.

Secondly, the trustees where they have taken interim compensation, should be required to satisfy the court that the sum was fair and reasonable. The Commission suggests that the guidelines respecting the sums payable as compensation on an interim basis might be provided by regulation.

Thirdly, the Commission recommended that where the interim compensation was not fair and reasonable, the court should determine what is fair and reasonable and any difference should be returned with interest.

Some modification of these controls is necessary because of the difference between a trusteeship and a conservatorship. Of significant difference is the Committee's wish to avoid recommending going to court which has resulted in the setting up of other mechanisms wherever possible. The Ontario Law Reform Commission, of course, assumes the trustee will pass its accounts sooner or later before the court.

It is possible that compensation claimed by either the Public Trustee or a private conservator be in excess of the guidelines set out. Application to the court could be avoided by switching the onus to the conservator claiming compensation to obtain consent from those persons to whom he or she must provide with notice of availability of a financial statement. This class of persons excludes the incapable person as circumstances prevent him or her from giving valid consent.

RECOMMENDATION: COSTS OF ACCOUNTING

47 THE COSTS OF PRODUCING ACCOUNTS AND STATEMENT OF COMPENSATION CLAIMED AND SUBMITTING SAME TO THE PUBLIC TRUSTEE SHOULD BE INCLUDED AS PART OF THE COMPENSATION CLAIMED.

EXPLANATION

The conservator should not be awarded anything over and above his, her or its compensation for doing these things. If professional accounting or legal help is retained by the conservator in these matters it should be paid out of the conservator's compensation and be a

personal liability of the conservator, not an additional expense to the estate.

This is consistent with the concepts which the Committee has espoused, namely, the avoidance, if possible, of legal or court costs. It is also consistent with the concept that a conservator as a fiduciary has as a normal part of the office a duty to keep accounts, and the ordinary compensation to which he or she is entitled covers this responsibility.

RECOMMENDATION: LEGAL FEES RE ACCOUNTING

48 WHERE THE ACCOUNTS AND COMPENSATION CLAIM ARE SUBMITTED TO THE COURT, THE LEGAL FEES OF THE SOLICITOR RETAINED TO PRESENT THE ACCOUNTS AND COMPENSATION CLAIM SHOULD BE IN THE DISCRETION OF THE JUDGE. IN ADDITION, JUDICIAL DISCRETION SHOULD EXTEND TO QUANTUM OF LEGAL COSTS INCURRED IN JUSTIFYING THE ACCOUNTS AND COMPENSATION CLAIM IF THE PUBLIC TRUSTEE INITIALLY REJECTS THE ACCOUNTS OR THE COMPENSATION CLAIM AND THE CONSERVATOR MAKES FURTHER SUBMISSIONS TO THE PUBLIC TRUSTEE.

Note: This recommendation is not intended to address the issue of proper professional accounts rendered for legal or other professional work properly incurred by the conservator in carrying out his responsibilities.

EXPLANATION

This recommendation is consistent with the usual practice before the courts. The point about the legal costs of additional submissions to the Public Trustee, recognizes bona fide attempts at settling matters without going to court. The conservator knows that if the matter ends up in court he will have a chance of not having to pay for his extra efforts to settle matters amicably.

RECOMMENDATION: LEGAL COUNSEL AND FEES

- 49 (1) IN A PROCEEDING OF A COURT OR TRIBUNAL TO DETERMINE THE CAPACITY OF AN INDIVIDUAL TO MANAGE PROPERTY, THERE SHOULD BE AN IRREBUTTABLE PRESUMPTION THAT THE ALLEGEDLY INCAPABLE PERSON HAS CAPACITY TO INSTRUCT COUNSEL.
- 49 (2) WHETHER OR NOT THE PERSON WHO IS THE SUBJECT OF THE PROCEEDINGS TO DETERMINE CAPACITY TO MANAGE PROPERTY IS FOUND CAPABLE OR INCAPABLE OF MANAGING HIS OR HER PROPERTY, THE ESTATE OF THE PERSON SHOULD BE LIABLE FOR HIS OR HER LEGAL FEES RELATED TO THE PROCEEDINGS.--

EXPLANATION

There are two major problems related to the legal representation of persons who are alleged to be incapable of managing their property and persons who have been medically certified or found by a court to be incapable of managing. The first is that a litigation guardian, a person appointed to instruct counsel, can be appointed for

them; the second is that a lawyer may not take their case because there is a good chance that he or she will not be paid.

The first problem arises because in a court proceeding, it is vital that the plaintiff or defendant be able to instruct his or her legal counsel on how to proceed. If there is any doubt with regard to a party's capacity, the court can be asked to appoint a litigation guardian. Rules 7.03, 7.04, 7.05, 7.06 and 7.07 of the Rules of Civil Procedure deal with the appointment, removal and duties of a litigation guardian. In most cases, the power to appoint a litigation guardian is important. However, where the issue before a court or tribunal is whether a person is capable of managing his or her property, no litigation guardian can properly be appointed. The appointment of a litigation guardian is based on the decision that the person for whom the appointment is made is suffering from a disability -- the central issue of the hearing. The situation is analogous to a criminal trial and not a civil proceeding. In criminal trials, there is no appointment of a litigation guardian. Therefore, it is recommended that in proceedings of a court or tribunal to determine whether a person is capable of managing his or her property, there should be an irrebuttable presumption of his or her capacity to instruct counsel.

The second problem relates to how the counsel who acts for a person who is, or is alleged to be, incapable is to collect his or her fees. In the existing situation, if a lawyer acts for a client, and the client is found to be incapable of managing, the estate will sometimes refuse to pay the fees of the lawyer. More important than the livelihood of the lawyer, is the fact that this state of the law results in lawyers refusing to act for a person in

such an action. Just when the person needs counsel to protect themselves from losing control of their property, the law makes it a gamble for the lawyer to act. This is totally unsatisfactory. Whether or not the person is found to be incapable, the person should have a right to be represented and that representation should be paid for out of the assets of the person's estate.

Several provisions of the Rules of Civil Procedure protect the conservator and estate. The Rules of Civil Procedure give the judge power to award costs in the proceeding. The conservator can also have the bill of the lawyer assessed by an assessment officer to determine whether it is reasonable.

PART VIII -- AVOIDING CONSERVATORSHIP: THE
COMMUNITY SERVICE WORKER

NOTE: THIS CHAPTER HAS BEEN OBJECTED TO BY BOTH THE MINISTRY OF HEALTH AND THE MINISTRY OF COMMUNITY AND SOCIAL SERVICES. THE REPRESENTATIVE OF THE MINISTRY OF HEALTH FEELS THAT THE CHAPTER DEALS WITH AN AREA PROPERLY CONSIDERED IN REGARD TO PERSONAL GUARDIANSHIP AND AS SUCH, EXTENDS BEYOND THE MANDATE OF THIS COMMITTEE. IN A STATEMENT OF NON-CONCURRENCE, THE REPRESENTATIVE OF THE MINISTRY OF COMMUNITY AND SOCIAL SERVICES RAISES ADMINISTRATIVE QUERIES WITH RESPECT TO THE JURISDICTION, SUPERVISION, AND FUNDING OF THE PROGRAM.

Some Background

We know very little about inherent human mental capacity. Today, psychologists believe that inherent capacity is likely composed of such elements as long and short-term memory and the ability to place events in time and space. Science has not devised measurement systems that directly measure inherent mental capacity. There is no instrument that will tell us directly the inherent capacity of an individual. Indirect tests that attempt to determine mental capacity, for example, "intelligence tests", while useful in many circumstances, may be highly misleading in others. Employed by persons who know the limitations, tests can be helpful.

Capacity to deal with property seems to occur as a spectrum. At one end are highly informed, highly motivated individuals who devote much of their time and

effort to property related issues and who, therefore, appear to have very high capacity to deal with property. Persons in business, economists, accountants, and market analysis are among those at this end of the spectrum. At the other end of the spectrum are persons who appear unable to understand any notion of money and its use. These persons appear to lack all capacity to deal with property. They must be cared for by others to survive. Most people appear to have a capacity to deal with property that falls between the extreme ends of the spectrum.

The public policy of protecting individuals who have little capacity to deal with property from serious harm requires that a point on the spectrum be identified at which the individual's right to self-determination should be replaced by someone else making property decisions for them. The Committee has recommended that the point on the spectrum should be where an individual cannot understand the nature of his or her acts or refusal to act with respect to property or cannot appreciate the consequences of acting or refusing to act in this regard. The Committee has used this definition because it believes that at this point the individual is not making a real choice -- a choice about which the community is comfortable in holding the individual responsible.

The development and the retention of the capacity to make choices with respect to property for many individuals seems to depend on environmental elements. It seems to depend on the opportunity to try to choose and to learn by making mistakes. It seems to depend on an information network, family, friends and acquaintances who suggest options and the consequences that may occur as a result of an action. It seems to depend on having friendly persons

to provide reassurance of an individual's ability to choose. It seems to depend on freedom from high anxiety. It seems to depend on motivation and caring about self-determination and the result.

There appears to be some persons whose inherent mental capacity is in the "grey area" who may or may not have sufficient inherent capacity to make real choices with respect to their property. Without environmental support and encouragement these persons would certainly be found to be incapable of managing their property. There also appear to be individuals who may have demonstrated significant mental capacity to manage property but who, through mental illness or grief, have lost the motivation to focus their attention on the nature of their acts with respect to property and the consequences thereof. For example, an elderly person on the death of the property-managing spouse may be at a critical point regarding his or her capacity to manage property. The skills of managing bank accounts, payment of bills, decisions about investments and where to live will be new learning. Without information expressed in a simple way and moral and emotional support from family and friends the individual may be incapable of managing his or her property.

Elderly people often find that they have no support system. Family and friends have died. They may have difficulty starting new relationships. They have not learned to use the extensive social service system and may be ashamed or afraid to try. Motivation is often low. Under these circumstances, it is easy to let themselves become incapable of choosing, to feel that it is all beyond their capacity, to give up on self-determination.

Ex-psychiatric patients may also face serious problems in becoming capable or retaining capacity to manage their own property. Self-esteem is often low. They may lack information about their range of choices regarding housing, obtaining nutritious meals and social services. Often the manifestations of an illness have isolated them from family and former friends. If they have been in a psychiatric facility for any length of time, they would have had decisions made for them. Under these circumstances, even where there is inherent capacity to make decisions respecting property, anxiety, confusion, and lack of information may result in apparent incapacity to manage in the absence of supportive assistance.

The Committee's mandate is to recommend reform with respect to the property of incapable persons. It has recommended reform of the law governing durable powers of attorney, statutory conservatorship, and court-appointed conservatorship. The Committee has also attempted to make it clear that reform of this law cannot appropriately be divorced from consideration of the incapacity of persons to make decisions for themselves with respect to the necessities of life and laws to provide substitute decision-makers -- personal guardians. Property is, in part, a social tool, to provide for shelter, food, clothing and other necessities of life. While the preservation and proper use of property may require special skills and the protection of property may suggest special safeguards, the concern underlying these recommendations with respect to property is a concern for the incapacitated individual.

It is the Committee's view that voluntary assistance available to individuals who are having difficulty in making decisions can help prevent an individual who has

sufficient inherent capacity from being, and being found, incapable of managing his or her property. Even more crucial is the need for such voluntary services to assist persons who are having difficulty providing themselves with the necessities of life. The Committee believes that in many cases, the availability of these services would avoid the need for conservatorship or personal guardianship. It believes that making support available to attempt to assist persons in danger of losing their capacity to make their own decisions is consistent with a high societal value placed on self-determination.

There presently exists a network of adult protective service workers in Ontario, which provides help to mentally retarded persons living in the community. The program is funded by the Ministry of Community and Social Services and is held in high regard by the community. It facilitated the deinstitutionalization of many retarded persons enabling them to live a life as normal as possible within the community. Without the adult protective service worker program, guardianship for many of these individuals might be necessary.

RECOMMENDATION: AVOIDING CONSERVATORSHIP AND PERSONAL
GUARDIANSHIP

50 (1) IT SHOULD BE A GOVERNMENT OBJECTIVE TO ENABLE
MENTALLY DISADVANTAGED ADULTS TO LEAD LIVES AS
INDEPENDENTLY AND NORMALLY AS POSSIBLE,
CONSISTENT WITH THEIR RIGHTS AND WISHES.

50 (2) TO REACH THIS OBJECTIVE, A SYSTEM SHOULD BE
ESTABLISHED WHEREBY COMMUNITY WORKERS CAN BE MADE
AVAILABLE TO HELP MENTALLY DISADVANTAGED ADULTS

WHO NEED AND WANT ASSISTANCE IN MAKING THEIR OWN
PROPERTY AND LIFE CHOICES.

- 50 (3) TO ENSURE THAT SERVICES PROVIDED BY COMMUNITY
WORKERS ARE ONLY SUPPORTIVE OF DECISION-MAKING BY
MENTALLY DISADVANTAGED ADULTS, AND ARE ONLY
PROVIDED WITH THE CONSENT OF THOSE ADULTS, CORE
FUNCTIONS AND STANDARDS SHOULD BE IDENTIFIED AND
ESTABLISHED AS CONDITIONS TO TO ANY PARTICIPATION
IN THE SYSTEM.
- 50 (4) TO ADMINISTER THE SYSTEM, ENSURE THAT THE CORE
FUNCTIONS AND STANDARDS ARE MET, AND TO ALLOCATE
AVAILABLE FUNDING IN ACCORDANCE WITH THE MOST
URGENT NEEDS OF DISADVANTAGED ADULTS, A BOARD
SHOULD BE ESTABLISHED CONTROLLED BY DIRECTORS WHO
ARE PREDOMINATELY REPRESENTATIVE OF ORGANIZATIONS
FOR THE MENTALLY DISADVANTAGED AND THE GOVERNMENT.
- 50 (5) THE ADMINISTRATIVE STRUCTURE -- THE BOARD, AND
THE CORE FUNCTIONS AND STANDARDS -- SHOULD BE
ESTABLISHED FIRST. THEN, AS FUNDS ARE MADE
AVAILABLE, VARIOUS MODELS FOR THE ALLOCATION TO
LOCAL COMMUNITY AGENCIES CAN BE CONSIDERED AND
APPROVED.
- 50 (6) COMMUNITY WORKERS SHOULD BE AVAILABLE TO PERFORM
THE SERVICES RECOMMENDED IN REGARD TO THE SUMMARY
PROCEDURE FOR COURT APPOINTMENT OF CONSERVATORS
AND THE PROCEDURE FOR COURT TERMINATION OF
CONSERVATORSHIP.

EXPLANATION

Because the existence of a conservator or personal guardian provides clear authority for administrators, health care workers and others, conservatorship and personal guardianship may be preceived as beneficial. Laws providing for substitute decision-makers are necessary but should be used only as a last resort where independence of an individual is not attainable. The government objective should be to enable mentally disadvantaged adults to live lives as independently and normally as possible, consistent with their rights and wishes.

"Mentally disadvantaged adults" is the term chosen by the Committee to describe those individuals who are in the "grey area" between those who are clearly mentally capable of managing their own property and those who are clearly incapable of managing their own property. Persons in this group would likely also have difficulties in making choices other than those related to property management. Their problems could relate to obtaining goods and services necessary to life. In addition to the developmentally handicapped, who are now provided with adult protective service workers, the group would include the psychiatrically handicapped and head injury victims. It would also include elderly persons who are at risk due to being mentally disadvantaged.

It is vital that a community service worker program be, and be seen as, distinct from conservatorship and personal guardianship. It must have no element of coercion. Mentally disadvantaged adults often do not have a network of family and friends to provide information necessary to make real choices. They frequently lack the encouragement

necessary to confidently make choices. They may also not have the communication and social skills necessary to take the actions they have chosen. The community service worker system must be designed to facilitate decision-making by the mentally disadvantaged adult, and the system must be designed to prevent community workers from becoming an unofficial system of substitute decision-makers. To ensure that it is an extension of self-determination and not a restriction of it, the system must be carefully developed and supervised.

The system must be based on established core functions and standards to govern community service workers. With respect to services to avoid the imposition of conservatorship, the community worker should be available to provide the following services (additional functions would be necessary to avoid personal guardianship):

Core Functions

(i) Advocacy and Support Regarding Financial Management

The function would be to provide needed assistance in receiving, understanding and evaluating information concerning: the nature and extent of the property of a client, including the benefits to which the person is entitled; the client's legal obligation to support others and the identity of those who must be supported; and the actions necessary to manage the property. The function would also be to provide needed assistance in carrying out, or communicating, the client's decisions.

(ii) Case Management

The function would be to provide services, as needed, on an on-going basis to ensure continuity of the relationship between the community worker and the client. Services requested by the client would be recorded, arranged and the delivery of the services monitored. Many of the services would be generally available to the community, e.g. banking. Other services would be those designed to serve the mentally disadvantaged, e.g. applications for special pension benefits, arranging for special housing.

(iii) Counselling Directed to Achieve Unsupported Self-management

The function would be to provide and arrange for counselling that will assist the client to attain self-management of his or her property without the need for continued support from the community worker. This may involve the teaching of daily living skills, such as budgeting, record keeping and investing.

Standards

The system must establish standards for the provision of services in order that these services will be provided ethically and effectively.

(i) Consensual Relationship

The community service worker's relationship with

the person he or she is assisting must be based on mutual consent. The client must know that he or she has the right to terminate the service. Therefore, the community service worker must win the trust of the client by being trustworthy. This entails honesty and fidelity to the interests and instructions of the client. It also entails that the worker have expertise and experience.

(ii) Facilitative Role

Where the community worker believes the client is no longer making the decisions, he or she must be under a duty to withdraw from the relationship. To do otherwise would be to have the community service worker become a substitute decision-maker without the legal mandate or due process safeguards necessary for such a role. The community service worker cannot be required to assume a role which may conflict with that selected by the client. The role must be to facilitate the decisions of the client and any conflict with that will result in the disintegration of the relationship.

(iii) Privilege and Confidentiality

The community service worker should be expected to maintain confidentiality and not to disclose information without the client's consent. No one but the client should be able to make the community service worker a compellable witness in a proceeding to determine the capability of the client. This would assure the client of control

and freedom from mistakenly relying on the community service workers involvement.

(iv) The Client's Choice

Consistent with the consensual and facilitative role of the community service worker is the concept that the breakdown of a relationship with a client may not always be attributable to the client's incapacity. There should be flexibility in considering requests by an individual to have a different community service worker.

There will never be sufficient funds available from government and other sources to satisfy all perceived community needs. The allocation of scarce resources always raises issues of fairness. The Committee has recommended that in order to administer the system and allocate available funding in accordance with the most urgent needs of disadvantaged adults, a board should be established. This board should be, and should be seen to be, independent of the source of funding. It is the Committee's view that the fairest allocation of limited funds will result from placing control in a board of directors that is predominately representative of the organizations for the mentally disadvantaged and the government.

It is the Committee's view that the board and the core functions and standards should be established first. This would permit everyone interested in the welfare of mentally disadvantaged adults to understand the ground rules for community service workers. The board could then consider applications for funding of community workers by

community-based organizations and various models for the allocation of community workers.

The success of the APSW project with the developmentally handicapped clearly demonstrates that no pilot projects are necessary to prove the need for establishing the core functions and standards discussed above. However, there are good reasons for not implementing a comprehensive scheme of community workers immediately. The most important reason for allowing implementation on an incremental basis is to allow community agencies to establish themselves and begin the steps necessary to develop useful solutions to local problems. This slow-growth principle has been one of the keys to the success of community legal clinics.

The slow-growth principle would also allow the provincial board time to evaluate the strengths and weaknesses of various models of service delivery so that successes can be duplicated.

The slow-growth principle also takes into account the realities of government funding. While it is believed that the establishment of a community service worker system will immediately prove cost effective because it avoids the costs and rigidity of conservatorship and institutionalization, realization of these savings will be difficult to quantify and reallocate. In the meantime, funds available for what will be perceived as a new program are extremely limited.

The Committee anticipates that over time the community service worker program will become comprehensive, covering all mental handicaps regardless of the type of residential accommodation.

It is the Committee's hope that the community worker system will be in place and available to perform the services recommended in this Report with respect to the summary procedure for court appointment of conservators and the procedure for court termination of conservatorship.

